

SUPREME COURT OF THE UNITED STATES

DELAWARE, Plaintiff,

Versus

NO. 145, ORIGINAL

PENNSYLVANIA AND WISCONSIN

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ARKANSAS, ET AL, Plaintiffs,

Versus

DELAWARE

NO. 146, ORIGINAL

US Court of Appeals  
Second Circuit  
40 Foley Square, Courtroom 1505  
New York, New York 10007

SPECIAL MASTER: PIERRE N. LEVAL

122 East 42nd Street  
New York, New York 10168

June 5, 2017  
1:34 p.m.

Reported By:

Susan Petty

Job no. 18896

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Status Conference taken before Susan Petty, a shorthand reporter and Notary Public within and for the State of New York.

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JUDGE LEVAL: So let me ask you, as you speak during this conference, please begin for the benefit of the court reporter and myself by stating your name and who you appear for.

The first question I want to ask you as distributed in the agenda for the meeting is, does anybody have any problems with the case management Order Number One? Any issues you want to raise about this?

MR. ROSENTHAL: Your Honor, on behalf of the State of Delaware we have no problem with Order Number One.

JUDGE LEVAL: Everybody has got to tell me if you have no problems. I also want to know if you do have a problem.

Now, please stand and identify for starters who will be speaking on behalf of every party who expects to be speaking. You just did so, Mr. Rosenthal.

MR. ROSENTHAL: Also my colleague here, Tiffany Moseley will be speaking as well, both of us.

JUDGE LEVAL: All right. Who else

1  
2 expects to be speaking in this conference?

3 MR. HAVERSTICK: Good afternoon,  
4 Your Honor, on behalf of the Commonwealth  
5 of Pennsylvania. My colleague, Josh Voss,  
6 will be at points in time also speaking on  
7 behalf of the Commonwealth.

8 JUDGE LEVAL: Ross?

9 MR. HAVERSTICK: Voss, V, as in  
10 Victor.

11 MR. BRONNI: Good afternoon, Your  
12 Honor. Nick Bronni on behalf of the State  
13 of Arkansas and the Coalition States along  
14 with Counsel for the State of Texas who  
15 will be doing most of the argument on  
16 behalf of the Coalition.

17 MR. DISHER: Good afternoon, Your  
18 Honor. My name is Todd Disher with the  
19 State of Texas. I'll be talking on behalf  
20 of the Coalition States as well as the  
21 State of Wisconsin today.

22 JUDGE LEVAL: Tell me your name  
23 again.

24 MR. DISHER: Todd Disher,  
25 D-I-S-H-E-R.

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JUDGE LEVAL: All right. The next issue that I put on the agenda -- I'm sorry.

MR. RATO: Your Honor, Michael Rato, R-A-T-O, from McElroy Deutsch. I'm going to be speaking as little as possible, but on behalf of MoneyGram.

JUDGE LEVAL: So the first question that occurred to me is that we might restructure the pleadings.

In Case Number 145 Delaware is the plaintiff. Pennsylvania and Wisconsin are the defendants. Delaware is the plaintiff, and in the counterclaim, the defendant. But Delaware is also -- now to Case 146 -- the defendant and counterclaim Plaintiff and so forth. And it seems to me to be unnecessarily confusing. Did I get that wrong? It doesn't matter. It's confusing whether I got it wrong; or not. All the more so if I did.

MR. ROSENTHAL: I think, Your Honor -- Steve Rosenthal on behalf of the State of Delaware. I think Your Honor has

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2 identified something which occurred to me  
3 on the train up.

4 I would recommend, with the approval  
5 of all of the parties, that the State of  
6 Delaware is prepared to be designated as  
7 the plaintiff in the case and the other  
8 States as the defendants.

9 It seems to me that -- obviously  
10 we're all counter-claimants to each other,  
11 but I think that would be the most elegant  
12 way of --

13 JUDGE LEVAL: Well, that was exactly  
14 what I was going to suggest. I was going  
15 to suggest that Case Number 146 simply no  
16 longer be proceeded in; that the pleadings  
17 be restated or some of them be restated so  
18 that Delaware's complaint in 145 would  
19 become a complaint against all of the  
20 States that are now in this case.

21 And that all of those States would  
22 counterclaim against Delaware, both sides  
23 essentially claiming for for declaratory  
24 judgment as to who is entitled to these  
25 Escheats.

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And for all purposes from now on, we could call Delaware the plaintiff, and the other States would all be defendants.

Did I gather from Mr. Rosenthal's statement that everyone has, that you've all discussed that and are agreeable to it?

MR. ROSENTHAL: I didn't mean to imply that we discussed it, but it was in our order and kind of organized that way. And I thought it was acceptable.

JUDGE LEVAL: Well, does anybody have anything to say on the subject; any contrary arguments? Any reason why that would not be a desirable thing to do?

MR. DISHER: No, Your Honor. That would be fine with us.

JUDGE LEVAL: So there will be, then, an amendment to the pleadings. If you will file amended pleadings, if Delaware would amend its pleadings in Case Number 145 to name all the States, all the States that have appeared so far in this action as defendants. And then there

1  
2 would be a counterclaim by all of those  
3 States likewise seeking declaratory relief  
4 and damages against Delaware. All right.

5 What would be a reasonable date to  
6 expect those pleadings to be filed,  
7 Delaware?

8 MR. ROSENTHAL: My only question is;  
9 Do we need to do printed pleadings at this  
10 point, Your Honor?

11 JUDGE LEVAL: You are suggesting  
12 that they are unnecessary?

13 MR. ROSENTHAL: I'm suggesting that  
14 it adds time and expense to the process.  
15 And I don't think it's necessary, unless  
16 Your Honor or the Supreme Court requires  
17 it.

18 JUDGE LEVAL: Maybe you can simply  
19 file a stipulation that will say that  
20 Delaware's complaint at 145 is hereby  
21 amended to add as defendants all of those  
22 States, and that the other States say that  
23 the papers that they had filed in 145 or  
24 146 shall be deemed responsive to  
25 Delaware's pleading in 145.

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MR. ROSENTHAL: My estimate is if we can go by a stipulation that we should be able to reach an agreement on that with the other States within two weeks or so.

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JUDGE LEVAL: Okay. So you will file that. Thank you.

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Now, a further subject that I wanted to discuss, and it doesn't need to be resolved right now, is that this action has a capacity to be unwieldy by virtue of the number of States involved on the other side.

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And since your interests seem to be all very precisely aligned, I wonder how necessary it is to have numerous voices speaking on behalf of all the States that are opposing Delaware.

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And there are two different issues: One is for telephone conferences.

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I would hope not to be required to cause all of you to have to travel considerable distances to New York every time there's something that I wanted to discuss with you.

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And I will envision that there will be times when it will be useful to have telephone conferences to discuss some matters. But telephone conferences are particularly unwieldy and difficult when there are numerous parties involved.

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They are particularly so for the Judge, because when lawyers start talking, a Judge often wants to interrupt to ask a question or to ask for clarification. But when voices are going one way, it is simply impossible for the Judge to do so.

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So I had hoped that for purposes of these, at least, telephone conferences, we might get down to -- telephone conferences at which nothing of great importance would be decided -- that we might be able to have one State speaking for all the rest of them against Delaware in such telephone conferences.

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And then the second subject is the same issue for all purposes for actual appearances. And that doesn't need to be decided right now, especially the latter.

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Furthermore, whatever is decided, if

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it were decided to do that, it doesn't

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need to be irrevocable. So that if one

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State had yielded to another, the voice to

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speak for all of the States; and then at a

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later time that State for whatever reason

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says, We want to reassert the right to be

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heard at sessions by your own counsel, you

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could simply revoke whatever had

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previously been given and assert that

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right. So that's something for you to

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discuss.

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I think it would be beneficial. I

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think it would serve the interests of

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things being done expeditiously.

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But you can discuss it amongst

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yourselves, and report to the Court at a

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later time on what you have decided.

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Does anybody want to be heard on

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that right now? Does anybody have

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anything to say on the subject of whether

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you think that would not be a good idea or

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anything to say on that subject? No?

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(No verbal response.)

Another small matter is just for convenience. I know that some of you are States, and some of you are Commonwealths. But as far as the Constitution is concerned, you are all States.

This is an action in the original jurisdiction of the Supreme Court, because it is a suit between States. And States is the Constitutional term. I would hope we can simply refer to everybody as a State from now on, rather than referring to some as Commonwealths and others as States.

So I guess we will proceed to arguments on the motions, and we will first hear Delaware's motion to expand the litigation to cover other similar instruments issued by entities other than MoneyGram.

MS. MOSELEY: Good afternoon, Your Honor. Tiffany Moseley on behalf of the State of Delaware.

Since I find myself going first, I

1  
2 thought it might be helpful to start with  
3 just a very brief background. In February  
4 of last year 2016, Counsel --

5 JUDGE LEVAL: See if you can elevate  
6 the microphone and speak directly into it.

7 MS. MOSELEY: Is that better?

8 JUDGE LEVAL: That is much better.

9 MS. MOSELEY: So as I was saying,  
10 last February of 2016, Counsel for  
11 Pennsylvania initiated a suit against  
12 Delaware and MoneyGram in the Middle  
13 District of Pennsylvania alleging that  
14 Delaware owed Pennsylvania, approximately,  
15 \$10 million in unclaimed official checks  
16 that had been marketed by MoneyGram and  
17 escheated to Delaware as MoneyGram's State  
18 of Incorporation.

19 At the time, Delaware challenged the  
20 jurisdiction. There was some back and  
21 forth. Subsequently Wisconsin filed in  
22 the District Court on the same issue  
23 alleging the same ground. Which is why  
24 the State of Delaware eventually filed the  
25 original action 145 in the Supreme Court

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2 to resolve the issue. And so then the  
3 other States filed against Delaware  
4 seeking to resolve all at once.

5 And in the backdrop for this dispute  
6 is that there is a longstanding line of  
7 Supreme Court cases that holds that  
8 property which a holder has in which they  
9 don't have an address, that that  
10 un-address, unclaimed property escheats to  
11 the holder State of Incorporation. And  
12 it's a trilogy of cases commonly referred  
13 to as the Texas Trilogy.

14 The second case in the trilogy,  
15 which I believe is New York versus  
16 Pennsylvania involved the escheat of money  
17 orders that were sold by Western Union.  
18 And in that case the Supreme Court held  
19 that the unclaimed proceeds from money  
20 orders escheated to the State of  
21 Incorporation. That decision was  
22 overturned by the Statute that's at issue  
23 in this case; the Federal disposition of  
24 abandoned money orders and Travelers  
25 Checks.

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JUDGE LEVAL: What was the date of the Statute?

MS. MOSELEY: 1974, Your Honor. So the Statue has been around for a decade. And that happened in the mid-1970's, even though the question before Your Honor today is whether the financial products that are marketed under the name official checks are subject to the escheat under the Federal Disposition of the Abandoned Money Orders Act.

JUDGE LEVAL: I don't think that's the question; whether instruments that are sold under the name of official checks are -- I don't think -- I mean, it happens that MoneyGram issues these instruments under the name official checks.

But, I mean, they could call them banana rolls if they wanted to. Official checks is not a term that has a clear, understood meaning. The issue before me, as I understand it, is whether the instrument's issued by MoneyGram, whether they are called banana rolls or official

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2 checks or whatever they're called, are  
3 subject to escheat by Delaware or by the  
4 State where the check, where the item was  
5 purchased.

6 MS. MOSELEY: Yes, Your Honor. I  
7 don't disagree with that, banana roll or  
8 official checks. What I was trying to  
9 express is that this is, in fact, an  
10 official check, that has a well-understood  
11 meaning as a negotiable instrument in the  
12 UCC or anywhere.

13 And so we are left in the situation  
14 of having an instrument that's called, of  
15 having many different instruments that are  
16 called official checks. And how do they  
17 escheat? Is it under the Texas Trilogy,  
18 the State of Delaware, The State of  
19 Incorporation, or to the State of purchase  
20 under the Federal Disposition of the  
21 Abandonment of Money Orders and Travelers  
22 Checks Act.

23 I think that that sort of leads you  
24 to the question of what instruments are we  
25 talking about? What do they look like?

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2 Are they similar to anything that is under  
3 the UCC? How do we treat these  
4 instruments? And I think that another  
5 important question is given that this Act  
6 has been in place for over 40 years, how  
7 has this --

8 JUDGE LEVAL: Could you slow down a  
9 little bit? With this sound system, your  
10 words tend to all --

11 MS. MOSELEY: Oh, I apologize.

12 JUDGE LEVAL: It's not your fault.

13 MS. MOSELEY: I will go slower. I  
14 think that it leads to sort of two natural  
15 questions; one which Your Honor already  
16 posed. And that is what are these  
17 instruments? Are they official checks?  
18 Are they teller's checks? Are they  
19 cashiers checks?

20 How do we view them and what is the  
21 understood meaning of what these  
22 negotiable instruments? And how does that  
23 impact the similarity to a money order or,  
24 say, to an executed third-party bank check  
25 under the Act for the purpose of escheat?

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And one of the issues that I think is relevant to that analysis, particularly given that the Act has been in place for 40 years, is how States have historically treated these similar written negotiable instruments.

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JUDGE LEVAL: How has who historically treated?

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MS. MOSELEY: The States. How have Delaware, Texas, Arkansas, the States that are a party to this action that are before you, how have they historically treated these negotiable instruments that are similar or possibly dissimilar to money orders for the purpose of the escheat? This is not a blank canvas. This statute has been in existence for 40 years. And MoneyGram and other entities that sell official checks or banana rolls have been escheated 40 years to all the different States. And we believe how these escheats have been understood by the States forms the interpretation of the Act that's before Your Honor.

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2           And that's directly what Delaware  
3 amended its target to do; to say that when  
4 we look at all of this we think we should  
5 resolve how these similar or dissimilar  
6 written negotiable instruments are  
7 governed. Is it under the Texas Trilogy,  
8 or is it under the Act? And I know --

9           JUDGE LEVAL: I don't understand  
10 that argument as necessarily supporting  
11 your motion to amend the pleadings. I  
12 mean, assuming that I were to agree, and  
13 I'm not saying I do or I don't. But if it  
14 is the case that house States have treated  
15 instruments that are like or somewhat  
16 unlike these MoneyGram official checks or  
17 money orders, if it is relevant how States  
18 have treated these and other instruments,  
19 if it is relevant to illuminate the  
20 question of whether these instruments  
21 issued by MoneyGram go to Delaware or to  
22 the State where they were purchased,  
23 that's an issue that you can enquire into;  
24 both on discovery and in argument to the  
25 Court.

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But it doesn't necessarily follow from that, I don't think the argument you are making supports the argument that the case should be expanded to place in controversy who gets the money, not only from MoneyGram's instruments which are the subject of this suit, but from untold different instruments; some like, some unlike, issued by untold other entities in commerce.

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I mean, the argument that you're making may make perfect sense, and I can, yes, everything you say is a hundred percent right.

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But that wouldn't advanced me necessarily one iota toward the conclusion, if the case should now place in controversy between the States untold numbers of different instruments issued by different issuers.

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MS. MOSELEY: I'm going to try to respond. I think there a couple of different questions you're saying to me. The first one is a very practical one,

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2 which the other States have raised and  
3 which is making the case unreasonable.

4 So I'm sure all the States can stand  
5 up and say the escheat of negotiable  
6 financial instruments happens under the  
7 National Association of Unclaimed Property  
8 Administrator or an acronym called NAUPA,  
9 and promulgates the codes. And all the  
10 States use these codes for the purpose of  
11 classifying escheats.

12 There are 16 codes that apply to  
13 written negotiable instruments, and we  
14 think half of them are completely  
15 inapplicable on its face.

16 JUDGE LEVAL: Completely  
17 inapplicable?

18 MS. MOSELEY: To this case or vendor  
19 checks or other types of pension checks  
20 that you would classify an escheat or  
21 money order, those items here are not  
22 eligible. We think there are between  
23 eight and ten that codes that all entities  
24 are escheated under, and it gets recorded  
25 into a database. The vast majority of the

1  
2 States use the same database, be it an  
3 earlier version or a successor version.

4 So what we're talking about is  
5 getting a printout of the entities that  
6 report under these codes. You can cross  
7 compare between the States that are in  
8 this case to see if they are reporting to  
9 the State of Incorporation that are  
10 important under the States.

11 And you would take a sample of  
12 exemplars and you would look at them and  
13 you would fully resolve the issue of what  
14 are these; be it official checks or banana  
15 rolls or whatever you're going to call  
16 them, whether the States are treating them  
17 as if they were similar to money orders,  
18 or if they are telling, banks and branches  
19 from other States to go ahead and escheat  
20 on the cashiers checks back to their State  
21 as the State of Incorporation.

22 And since we are going to be looking  
23 at all of that to the determine -- and I  
24 believe it is targeted. We're talking  
25 about eight to ten codes. If you look at

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2 that, one, will we be following the  
3 Supreme Court precedent that says that  
4 there is a long-standing policy that you  
5 look at how the Statute has been  
6 interpreted by the agency that's seeking  
7 to enforce that statute or they are  
8 challenging it.

9 And we believe that it's critical  
10 for this relevant information to interpret  
11 the Statute. The purpose of our amendment  
12 is to say we're looking at all this, and  
13 we have all this information. Why would  
14 we do this piecemeal? Why would we say  
15 it's banana rolls, or MoneyGram in this  
16 way but not deal with any others?

17 And potentially if you follow the  
18 litigation related to the official checks  
19 or banana rolls issued by the IPS, which  
20 is actually the company that --

21 JUDGE LEVAL: What company?

22 MS. MOSELEY: It's called IPS;  
23 Integrated Payroll Systems. And in  
24 Paragraph 33 of the Arkansas Complaint --  
25 and I understand that there is an

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2 agreement that we will all be pleading, so  
3 we will have to figure out how to  
4 reference all of these. But in their  
5 original action 146, Paragraph 33,  
6 Arkansas specifically references that  
7 there are other entities, other than  
8 MoneyGram that issues official checks, or  
9 these written instruments that are not  
10 categorized in the UCC.

11 And so they know that there are  
12 other entities that do this. They know  
13 that they are escheated in different  
14 States, and States are treating them in  
15 different ways.

16 So our amendment isn't -- I don't  
17 think it's speculative. There are other  
18 entities that do it. And I think it was  
19 definitely contemplated by the parties.  
20 It was only as we were reviewing these and  
21 going through it that Delaware became  
22 concerned that this counterclaim might be  
23 compulsory or mandatory counterclaim  
24 seeking not to bring an action. We would  
25 be actually prohibited from proceeding on

1  
2 the official checks that are issued by the  
3 other entities.

4 The essential fact is our client  
5 counterclaimed on the original action  
6 saying, How are these negotiable  
7 instruments treated? Are they treated  
8 similar to money orders under the Act? Or  
9 are the States treating them differently?

10 So we are concerned that there would  
11 be the compulsory counterclaim. And  
12 certainly we feel we have the permissive  
13 amendment standard under 15A for amending  
14 the pleadings.

15 I hope I have addressed Your Honor's  
16 questions. But that's why I believe that  
17 the amendment is directly related to this,  
18 and flows from this scope of discovery.

19 We don't want to end up in a  
20 situation where we're having to redo and  
21 bring another action to deal with the  
22 escheat of these other written  
23 instruments. Particularly because it can  
24 lead to the decision -- you could have --  
25 one case could have, you know, negotiable

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2 instruments to be determined to be similar  
3 to a money order and maybe in another  
4 proceeding it is not. And the bearer of  
5 the same instrument could be potentially  
6 escheated to different ways. So we think  
7 it's better to fully resolve all of them  
8 before Your Honor.

9 JUDGE LEVAL: All right. Thank you.

10 MS. MOSELEY: Just one other quickly,  
11 Your Honor. The State of Wisconsin had  
12 raised an issue as to whether or not we  
13 reached a new standard in order to amend  
14 our pleadings. In the Supreme Court we  
15 know that the case that they cited was  
16 Nebraska v. Wyoming. It involved a party  
17 seeking to amend their pleadings ten years  
18 after the case had begun and after the  
19 special master had already issued two  
20 reports.

21 We would just say that we think that  
22 case is relevant to this situation, and  
23 that is why we're seeking to amend at the  
24 very outset to make sure everything  
25 included in the beginning.

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JUDGE LEVAL: Well, the amending of the case ten years after it began is certainly pertinent to some kinds of issues. But the language quoted by your adversaries doesn't depend on the age of the case. It talks about the ordinary principles that govern a lenient approach to amendment of the pleadings and are not necessarily applicable to cases in the original jurisdiction of the Supreme Court where, I think, the language is something along the lines of that there's good reason to leave the case in the form that the Supreme Court expected it to be in, and raising the issues that the Supreme Court had noticed were the issues in the case.

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It didn't really talk about -- I mean, that the fact that it was ten years old is a very good reason to deny, or could be under some circumstances, a very good reason to deny the amendment of the pleadings. But that wasn't the reason that the Court addressed.

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2 MS. MOSELEY: I believe that in the  
3 context in which the Court was addressing  
4 the sought amendment -- and I believe when  
5 Your Honor is saying that whether or not  
6 it was contemplated by the Supreme Court  
7 at this time in granting the original  
8 jurisdiction, we would say here given that  
9 the Coalition States are suing us  
10 specifically carves out in the complaint,  
11 and there are a number of other entities  
12 that issues these types of money orders  
13 that are similar to the types of money --  
14 I'm sorry -- these types of official  
15 checks or banana rolls, that MoneyGram in  
16 this case -- we don't believe this is  
17 beyond the scope of what is being --

18 JUDGE LEVAL: So you have  
19 essentially made two different kinds of  
20 arguments; at least two. And I want to be  
21 sure that you understood what I was saying  
22 before.

23 And what I'm saying to you is; one  
24 of your arguments is that looking at how  
25 instruments that are similar and

1  
2 instrument that are dissimilar have been  
3 treated by the various States is relevant  
4 to determining how the MoneyGram  
5 instruments that are in question should be  
6 treated.

7           And assuming that is a hundred  
8 percent correct, it means that you should  
9 be able to enquire into how various states  
10 have treated other similar and dissimilar  
11 instruments, for the reason that those  
12 pieces of information will be illuminating  
13 as to how MoneyGram's instruments should  
14 be treated in this case.

15           And that can be a perfectly valid  
16 proposition and can authorize enquiry on  
17 discovery, and submissions of proof that  
18 relate to various States' treatment of  
19 various instruments issued by various  
20 companies for what light they shed on how  
21 MoneyGram's instruments should be treated  
22 in this case.

23           But that doesn't necessarily support  
24 the proposition that all such instruments  
25 that are out there and have been subject

1  
2 to escheat, whether it's similar or  
3 dissimilar should now become part of the  
4 this case.

5 You address that by a different  
6 argument, which is; the interest of  
7 efficiency in litigation argue in favor of  
8 having all these things litigated at one  
9 time together so as not to have to go back  
10 and have a new litigation over instruments  
11 that are similar to those MoneyGram, as  
12 well as over instruments that are  
13 different and should be treated  
14 differently from the ones that are so far  
15 in issue in this litigation.

16 MS. MOSELEY: Yes, Your Honor.  
17 Those are very much logically connected.  
18 I believe it's in the consideration of  
19 judicial economy and fairness to take all  
20 the issues and resolve them in the same  
21 case.

22 JUDGE LEVAL: Okay.

23 MR. DISHER: Good afternoon, Judge  
24 Leval.

25 JUDGE LEVAL: May we have your name

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and who you represent.

MR. DISHER: Todd Disher on behalf of the State of Texas speaking for the coalition of states.

JUDGE LEVAL: Okay. Thank you.

MR. DISHER: The problem with Delaware's attempt to amend its claims is that the attempt doesn't meet even the general pleading requirements, let alone the heightened standard that applies to an original action in the United States Supreme Court.

Delaware is attempting to bring claims based on unknown companies for an unknown amount based on unspecified negotiable instruments that are unknown in nature.

Allowing Delaware to bring such claims would vastly expand the scope of this case that was envisioned originally by the United States Supreme Court which grants us leave to file a bill of complaint.

That case that the U.S. Supreme

1  
2 Court looked at and granted was a specific  
3 issue with a specific company and a  
4 specific type of instrument.

5 That is not what Delaware is seeking  
6 to have in this case. In fact, we don't  
7 even know the extent of what Delaware is  
8 seeking to add to this case, because they  
9 still have not identified any instruments  
10 that they claim were wrongfully admitted  
11 to the Plaintiff's States -- excuse me --  
12 now the Defendant States in this matter.

13 As the case of Nebraska v. Wyoming  
14 cited by Wisconsin's brief makes clear,  
15 the normal solicitude for amending  
16 pleadings and adding claims simply does  
17 not apply to an original action in the  
18 highest Court.

19 Not only can they not meet that  
20 heightened standard, but they can't even  
21 meet a typical 12(b)(6) motion to dismiss.

22 In fact, this Court, based on their  
23 amended complaint, cannot grant them the  
24 relief they are praying for.

25 They are praying for a declaratory

1  
2 judgment that "These negotiable  
3 instruments are not subject to the statute  
4 at issue."

5 The problem with that, Your Honor,  
6 is that we don't know what these  
7 negotiable instruments are, because they  
8 have not identified them. They have now  
9 had five chances to identify to you, Your  
10 Honor, which companies and which  
11 negotiable instruments they want to bring  
12 into this case.

13 They filed their motion to amend  
14 their bill of complaint. They filed their  
15 motion to amend their counterclaim. They  
16 sent you a letter on May 2, 2017.

17 We filed a joint submission just  
18 last week, and even here today, they still  
19 have not identified which companies and  
20 which negotiable instruments they are  
21 attempting to bring into this case.

22 They haven't done so because they  
23 can't do so. Their attempt here is  
24 nothing more than a fishing expedition to  
25 determine what else is out there. That is

1  
2 not the proper province of an original  
3 action in the United States Supreme Court.

4 Moving to their argument about  
5 efficiency. That is simply not the case  
6 here. Allowing them to amend their claim  
7 and bring these unspecified claims based  
8 on these unspecified negotiable  
9 instruments will only unduly complicate  
10 this matter without providing any real  
11 benefit.

12 It would require the parties in this  
13 case to look at all negotiable instruments  
14 of all financial institutions across the  
15 entire country and then, only then, make  
16 two determinations based on that universe  
17 of negotiable instruments.

18 One, were they permitted and to  
19 which State? And then two, depending on  
20 which State were they remitted to, was it  
21 proper to remit that instrument to that  
22 State?

23 JUDGE LEVAL: Well, so part of the  
24 argument that your adversary counsel,  
25 Delaware, is making is that here we have a

1  
2 case in which 30 states are before the  
3 Court contesting the right to escheat  
4 MoneyGram's instruments.

5 Assume hypothetically that there are  
6 other instruments that are  
7 indistinguishable from MoneyGram's  
8 instruments, why not wrap them all up in  
9 this one case so as not to have a brand  
10 new litigation in the original  
11 jurisdiction of the Supreme Court, after  
12 this case is all over, over Company X's  
13 instruments that are exactly like  
14 MoneyGram's?

15 They argue that it would be more  
16 efficient to have them all wrapped up in  
17 this case. Of course they go beyond that,  
18 and they were also talking about  
19 instruments that are different and get the  
20 contrary judgment for instruments that are  
21 materially different and so forth.

22 How do you answer that argument?

23 MR. DISHER: Yes, Your Honor. I  
24 answer that in two ways. First, if that  
25 was the case, they would provide with

1  
2 specificity in their amended complaint an  
3 amended bill of complaint, so we can see  
4 exactly what they're asking for. Which is  
5 just a standard practice under the Federal  
6 Rules of Civil Procedure.

7 And, again, with that heightened  
8 burden in the original action, they have  
9 not met that. I've already explained that  
10 to you.

11 But the second point, is that is not  
12 what the Supreme Court granted us  
13 permission to do in this case.

14 The Supreme Court envisioned that  
15 this case would be based on a narrow issue  
16 and a limited set of factual circumstances  
17 in simply applying the law as it is to  
18 this limited universe of instruments based  
19 on this one company.

20 JUDGE LEVAL: So one thing I'm  
21 curious about; doesn't the Supreme Court  
22 have discretionary jurisdiction with  
23 respect to original jurisdiction between  
24 issues between States?

25 If one State sues another, and I see

1  
2 you filed petitions for -- I forgot how  
3 many -- a request for a petition to serve  
4 a complaint in the original jurisdiction,  
5 is that something that the Supreme Court  
6 has the right to turn him down? Can the  
7 Supreme Court say as per the petition for  
8 certiori right, No. We're not hearing  
9 that?

10 MR. DISHER: That's a very  
11 interesting question that we were actually  
12 talking about at breakfast this morning.

13 If you read the Constitution,  
14 obviously it does envision original and  
15 exclusive jurisdiction in the Supreme  
16 Court.

17 However, I know that there are  
18 examples in which the Supreme Court has  
19 indeed turned down a case between two  
20 States, and that's borne out of the case  
21 law --

22 JUDGE LEVAL: On what grounds? On  
23 grounds that obviously on its face there  
24 is not merit or on the grounds that we  
25 just don't feel like it?

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MR. DISHER: I don't think it's we don't feel like it. I think it's that the case itself hasn't risen to the significance for the Supreme Court to feel like, Yes. That is a case in which we will exercise our --

JUDGE LEVAL: Do you have a citation for a case like that?

MR. DISHER: I believe it is discussed in the Nebraska v. Wyoming case to a certain extent.

JUDGE LEVAL: So Nebraska v. Wyoming sets forth the proposition that the Supreme Court has some discretion, that the Supreme Court will only accept original jurisdiction cases if they have a significance, that they rise to a significance that makes it worth the Supreme Court's time?

MR. DISHER: Yes, Your Honor. There is a sentence to that, and I can read it to Your Honor if you would like.

JUDGE LEVAL: Yes, sir.

MR. DISHER: I also have a copy of

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the case if that would help you.

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So the Court says; Our requirement that leave be obtained before a complaint may be filed in an original action serves an important gatekeeping function. And proposed preceding amendments must be scrutinized closely in the first instance to see whether they would take the litigation beyond what was reasonably anticipated we were granted leave to file the initial pleading.

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So again the first part of that sentence recognizes that there is a gatekeeping function that the Supreme Court uses.

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And then I will point the Court to another case; Mississippi v. Louisiana 506 US 73 from 1992 in which the Court sets forth two factors that it looks to in determining whether or not to accept an original action. One, the nature of the interests of the complaining State, focusing on the seriousness and the dignity of the claim.

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And two, the availability of an  
ulterior forum in which the issue may be  
resolved. So, again, that does suggest  
that there is a gatekeeping function on  
original actions. And Delaware's attempt  
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JUDGE LEVAL: Is it just those two?  
Those two are the only considerations to  
be taken into account?

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MR. DISHER: Those are the two  
factors, and then I believe there are  
non-exclusive considerations where the  
Court analyzed it under the two factors.  
Unfortunately, I don't have that citation  
for you today. But, yes, those two  
factors.

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JUDGE LEVAL: So what about an  
alternative forum? If the Supreme Court  
were to turn down the case on the grounds  
of the first factor, it doesn't rise to  
the dignity or what would the States then  
do with their dispute.

24

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MR. DISHER: Your Honor, I believe  
that -- it may sound harsh -- but I

1  
2 believe that there may not be a forum for  
3 certain actions. That's why the two  
4 factors are both necessary required  
5 factors that a case must meet.

6 Not only can there not be an  
7 ulterior forum, but that case has to rise  
8 to the level of the Supreme Court sitting  
9 in original jurisdiction over that case.

10 In this particular case, Delaware's  
11 amorphous claims to pursue discovery  
12 against companies and claims that we don't  
13 know exist, does not rise to the level of  
14 the Supreme Court exercising original  
15 jurisdiction over those counterclaims.

16 Your Honor, I would additionally  
17 turn the Court's attention to MoneyGram's  
18 characterization of the official checks  
19 and the different pleadings that MoneyGram  
20 has filed in this case.

21 MoneyGram itself recognizes that the  
22 official checks is a category of  
23 documents, a category of instruments that  
24 share certain characteristics. And those  
25 characteristics that are shared by that

1  
2 particular instrument are uniformed across  
3 what is called an official check.

4 And those characteristics are the  
5 terms of the payment, the means of the  
6 sale, and the payor or the payee of that  
7 type of --

8 JUDGE LEVAL: You said they are  
9 uniformed across what?

10 MR. DISHER: They are uniformed  
11 across the instrument that MoneyGram  
12 titles official check. And so MoneyGram,  
13 understanding that in this particular case  
14 that the Supreme has granted leave to file  
15 this case, will be confined to one  
16 particular set of universal documents.

17 JUDGE LEVAL: I don't know whether  
18 any of you have included in your pleadings  
19 a copy of one of these instruments. If  
20 you have, I haven't seen it. Do the  
21 pleadings include a copy of one of the  
22 instruments that's at issue in the case  
23 issued by MoneyGram?

24 MR. ROSENTHAL: Your Honor, I  
25 believe that at one point Pennsylvania did

1  
2 include a copy. It may have been in the  
3 Federal District Court action. We  
4 certainly have one available.

5 JUDGE LEVAL: Does anybody have a  
6 copy you can --

7 MR. ROSENTHAL: We may have. We  
8 have done some research into this, and the  
9 official check is not even MoneyGram's.  
10 It's not a single instrument. It comes in  
11 many different formats. So no single  
12 instrument is going to show you what an  
13 official check is.

14 JUDGE LEVAL: All the same, would it  
15 be out of order for me to see one of them?

16 MR. ROSENTHAL: No, no, no. We're  
17 not objecting to it, but there would be  
18 more different and genuinely different  
19 formats than the one -- if anyone passes  
20 up one, it's not exclusive. That's all,  
21 the only point I'm making.

22 JUDGE LEVAL: Anyway, while you're  
23 looking, you may proceed with your  
24 argument.

25 MR. DISHER: Thank you, Your Honor.

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2 So, Judge, you are exactly correct when  
3 you framed the question in this case.

4 The question is not whether the  
5 instrument titled or labeled official  
6 check meets the statutory definition or  
7 falls within the Statute. It's what are  
8 the characteristics of this type of  
9 document, this universe of negotiable  
10 instruments. MoneyGram has acknowledged  
11 in their briefing in this case that the  
12 label "official check" applies to a  
13 specific universe of documents that share  
14 the same characteristics. And those are  
15 the characteristics that Your Honor have  
16 to look at to determine whether that  
17 category of the documents falls within the  
18 statutory framework.

19 And so Delaware's attempt to try to  
20 expand that and go beyond just a MoneyGram  
21 official check into a universe of all  
22 financial institutions and all different  
23 negotiable instruments is not what the  
24 Supreme Court envisioned when it granted  
25 leave to file this case.

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Indeed if Your Honor looked at the various pleadings and letters and filings by Delaware, this is just another attempt in a long line of Delaware attempts to do nothing but delay the Court's ultimate decision in this case.

If the Court will look at the joint filing, Delaware agrees that each case should be bifurcated, but only if there is a joint discovery created for damages and liability.

Your Honor there's no need for bifurcation in this case. Delaware is identifying what the legal issues are at play in this case; identified 19 separate issues for the Court to decide.

However, when you look at those 19 issues, you'll see that 12 of those issues are purely factual matters that will likely be undisputed. And the other seven are framing the one ultimate issue in this case in seven different ways.

There is one simple question that this Court has to decide, and that is

1  
2 whether the category of negotiable  
3 instruments labeled by MoneyGram as  
4 official checks falls within the Statute.

5 Delaware is doing everything it can  
6 to avoid a determination of that question,  
7 and their motion for leave to amend their  
8 claims is the most egregious example of  
9 that.

10 MR. HAVERSTICK: Your Honor, Matt  
11 Haverstick on behalf of Pennsylvania. We  
12 do have a photocopy of the MoneyGram  
13 official check and the MoneyGram agent  
14 check. Unfortunately they are not in  
15 color. That doesn't make a difference, I  
16 don't believe, but I can hand these up to  
17 the Court if you wish.

18 JUDGE LEVAL: All right. Has  
19 counsel seen it?

20 MR. HAVERSTICK: I imagine so.

21 MR. ROSENTHAL: If you could tell us  
22 where these are filed in the pleadings --

23 MR. HAVERSTICK: I don't know that  
24 they have been filed in the Supreme Court  
25 pleadings.

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MR. ROSENTHAL: So these are just  
3 some things that you just found in your  
4 file?

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MR. HAVERSTICK: I don't know that  
they were found. Mr. Rato could probably  
7 tell us exactly what they are.

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MR. ROSENTHAL: Well, we are  
different from Mr. Rato. And if these  
have not been filed, I think the better  
course, if Your Honor please, would be  
maybe to ask the parties in a very short  
period of time to provide you with copies.  
Delaware would be happy to provide you  
with the various copies.

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JUDGE LEVAL: Good idea. If these  
have not been previously exchanged with  
counsel, I won't take notice. But I'll  
ask you to, on notice, to have you submit  
copies of the instruments that are in  
question --

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MR. HAVERSTICK: Yes, Your Honor.

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JUDGE LEVAL: -- with the complaints  
that have been filed. One thing that I'm  
curious to know is do the instruments that

1  
2 are issued by the agents of MoneyGram, are  
3 they drawn on a bank? And if they are  
4 drawn on a bank, is it a bank that is part  
5 of the MoneyGram corporation, or is it a  
6 bank that is a stranger to MoneyGram?

7 MR. HAVERSTICK: Your Honor,  
8 Pennsylvania would like to also be heard  
9 on a response to Delaware's motion, and we  
10 may be able to answer that very question  
11 for you.

12 JUDGE LEVAL: Okay.

13 MR. VOSS: Good afternoon, Your  
14 Honor. My name is Joshua Voss. I'm  
15 counsel for the Commonwealth of  
16 Pennsylvania.

17 To the question you just asked, the  
18 agent checks in particular, if you're  
19 asking about agent checks, and I can  
20 represent to you the exemplar were handed  
21 to us by MoneyGram directly.

22 There is a bank involved as the  
23 institution from which the funds are  
24 housed or the custodian of the funds from  
25 which the funds will be drawn, if that

1  
2 answers your question. Perhaps the  
3 exemplar will better give guidance on  
4 this.

5 JUDGE LEVAL: When you're saying  
6 that MoneyGram's instruments in question,  
7 and for clarification am I correct that as  
8 I understand it, and, again, this may be  
9 incorrect. As I understand it, MoneyGram  
10 issues two types of instruments, at least  
11 two types. One is called money orders and  
12 they are characteristically in small  
13 denominations. And another is called  
14 official checks, and they are frequently  
15 in larger denominations. And if that is  
16 correct, so far this litigation concerns  
17 only the second category, the official  
18 checks and not the ones that are called  
19 money order; is that right?

20 MR. VOSS: That's it generally, yes,  
21 Your Honor. At least it's our  
22 understanding of some representations that  
23 MoneyGram has made in the Fifth Circuit.  
24 The case originated in the tax court.  
25 Certainly our review of the record through

1  
2 our third-party auditor suggests that  
3 that's the issue.

4 I guess, I hesitate to say and give  
5 an emphatic yes, because we believe some  
6 of these instruments are truly in the  
7 nature of the money order.

8 JUDGE LEVAL: What I'm saying  
9 doesn't in any way raise any question  
10 about whether they are in the nature of a  
11 money order.

12 I just was saying that they're  
13 called money orders as opposed to  
14 chocolate fudge sundaes. Once again, the  
15 name by which they're called, I was led to  
16 understand by something in your pleadings  
17 that there are two categories of  
18 instruments. One is called money orders,  
19 and they are for smaller amounts. And I  
20 guess they are preprinted in like \$10 or  
21 \$15 or something like that amount. And  
22 the other is something that's called an  
23 official check. And I don't know whether  
24 they are preprinted in previously fixed  
25 amounts, or whether they are done on the

1  
2 basis of the individual transaction, where  
3 the purchaser says, I want one for \$4,326,  
4 or what.

5 MR. VOSS: Speaking for the  
6 Commonwealth of Pennsylvania, we have  
7 identified 151,022 individual instruments.  
8 We understand those all to be of the  
9 official check category and not the  
10 stamped-on-the-front-money-order category.

11 So perhaps that answers your  
12 question. To the extent that you see two  
13 categories of instruments they sell, we  
14 are in the second category.

15 JUDGE LEVAL: We are what?

16 MR. VOSS: We are in the second  
17 category. We're looking at the official  
18 check category of MoneyGram marketing.

19 JUDGE LEVAL: So this suit, the  
20 pleadings in this suit do not address the  
21 money order category.

22 MR. VOSS: Certainly not for the  
23 Commonwealth of Pennsylvania. I can't  
24 speak for the Coalition States, but our  
25 pleadings are limited to that second

1  
2 category of MoneyGram instruments,  
3 official checks.

4 MR. DISHER: Your Honor, just to  
5 follow up on that, as far as the Coalition  
6 States is concerned, that is correct.  
7 This case deals with official checks and  
8 not money orders. And that's because  
9 money orders have been remitted to the  
10 plaintiff States, or the Defendant States,  
11 excuse me, under the Statutes.

12 So, yes. This just deals with what  
13 is labeled as official checks.

14 JUDGE LEVAL: And do they say, Pay  
15 to the order of?

16 MR. VOSS: I would be glad to hand  
17 these up.

18 JUDGE LEVAL: I'm not asking you to  
19 hand up anything. I'm asking you just to  
20 look --

21 MR. VOSS: So I'm looking at the  
22 official check provided to us by MoneyGram  
23 Payment Systems. It says pay to the order  
24 of. And this one is an agent check, or at  
25 least that's how they market it. But

1  
2 that's -- so the issue is official checks,  
3 and there are many branches under that  
4 tree. So another branch is the so-called  
5 agent checks, which are species of the  
6 official check, and these say pay to the  
7 order of as well, yes, Your Honor.

8 JUDGE LEVAL: And do they refer to a  
9 bank that is not MoneyGram?

10 MR. VOSS: Well, MoneyGram is not a  
11 bank. So the bank on this agent check  
12 that I'm looking at, the drawee is  
13 D-O-K-F-N-A of the City of Oklahoma. I  
14 probably mispronounced it. This is an  
15 official check. The drawee is that same  
16 bank in Oklahoma, again issued by  
17 MoneyGram Payment Systems.

18 Certainly Mr. Rato has some views as  
19 well for MoneyGram. But on the face of  
20 these instruments, yes. The answer is  
21 yes. You can draw them on a bank.

22 MR. DISHER: And, Your Honor, just  
23 to be crystal clear on one thing, while  
24 this, from the Plaintiff States, while  
25 this only deals with official checks, one

1  
2 of our arguments may very well be that  
3 official checks are indeed money orders.

4 So I just want to make that clear  
5 that we are not saying that we -- we're  
6 not saying that we are in no way dealing  
7 with money orders, because we may be  
8 making that argument as this case  
9 proceeds.

10 But in terms of what MoneyGram  
11 markets these two instruments as, you are  
12 absolutely correct that we are only  
13 dealing with instruments marketed as  
14 official checks.

15 MR. HAVERSTICK: So initially we had  
16 two points, and I'll raise the third based  
17 on an argument you heard from Delaware.  
18 But the first point is specifically this;  
19 limiting the case to just the MoneyGram  
20 instruments make sense to us for this  
21 reason.

22 Above all else, we need to know what  
23 does the Statute say. Are there similar  
24 instruments in third-party bank checks, is  
25 really how this case largely is going to

1  
2 go. What do those phrases mean as a  
3 matter of law?

4 It's almost entirely independent of  
5 what MoneyGram markets themselves. The  
6 Statutes means whatever the Statute means,  
7 regardless of whether it's banana  
8 wrappers, money orders, or whatever else,  
9 MoneyGram, or anybody else in the universe  
10 sells.

11 JUDGE LEVAL: Money order -- I  
12 misspoke a moment ago. Money order,  
13 unlike an official check, is a term used  
14 by the Statute. The Statute addresses  
15 money orders and travelers checks or other  
16 similar written instruments.

17 I suppose, I mean, it's kind of an  
18 interesting issue of statutory  
19 interpretation of whether something is or  
20 is not a money order governed by the  
21 Statute. It probably depends on factors  
22 other than whether the person who issued  
23 it wrote money order on it, or not.

24 MR. HAVERSTICK: I think that's  
25 right. If you look at the UCC definition

1  
2 of a check, it lists what can be a check  
3 and the note at the bottom under  
4 Pennsylvania's UCC and Delaware's UCC says  
5 an instrument can be a check, even if it's  
6 stamped with anything else such as money  
7 order.

8 So even the UCC recognizes that the  
9 label you put on it is largely immaterial.

10 Now, the phrase as used in the  
11 Statute obviously has to have some defined  
12 qualities that are going to go with it.  
13 And we trust that Your Honor one day can  
14 be called upon to define those  
15 characteristics and say; What's a money  
16 order? What's a travelers check? What is  
17 a similar instrument? What is a  
18 third-party bank check?

19 We submit that all those questions  
20 can be answered indeed even without  
21 looking at one of these MoneyGram  
22 instruments. Those are questions of law.  
23 They're not questions of fact.

24 Once we have the rules of the road,  
25 we can drive our car for all the other

1  
2 entities if we even need to. But really  
3 that threshold determination is what we're  
4 looking for here. So for Ms. Moseley to  
5 ask you to look at two or three or hundred  
6 more entities to figure out as a matter of  
7 law what Congress meant in 1973 when this  
8 was introduced in 1974 when it was  
9 enacted, I think is a bit of a  
10 misdirection. Giving it more of a  
11 liability phrase, quite frankly, than the  
12 law. So that's our first point.

13 The second point is, and we made  
14 this in our brief. And this may really  
15 put some meat on the bones of the case.  
16 We took a look at some public filings in  
17 the State of Delaware, and we were drawn  
18 to the office of the State Bank  
19 commission, and I have copies as well for  
20 counsel.

21 In his annual report for yearend  
22 2015 he discussed financial institutions  
23 in the State. And what we are struck by  
24 is that there is a category of financial  
25 institutions in the State that are

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2 licensed.

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These licensed entities are licensed checks sellers, and money transmitters.

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MR. ROSENTHAL: Your Honor, I'm going to object to this line of argument. None of this was presaged to Delaware. We were never shown these documents. No one ever raised with us that anything was going to be brought up here like this.

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It was outside of the pleadings. Outside of what was produced to us, and this is highly unfair to the opposing party, especially if you're intending to hand these materials up to the Court.

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JUDGE LEVAL: Well, we are not in jury proceedings. If you persuade me as to the irrelevance, I will disregard it. On the other hand, if I'm persuaded that it is relevant, I will look at it. I don't see any problem with it being handed up subject to your situation or your objection.

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MR. HAVERSTICK: If it would please the Court, I would like to hand these up,

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2 so we have a little better understanding.

3 JUDGE LEVAL: I take it there is no  
4 objection to their authenticity, that they  
5 are what they purport to be?

6 MR. HAVERSTICK: Perhaps the State  
7 of Delaware will object, but it's off  
8 Delaware's own website of the office of  
9 the State Commissioner. But I trust that  
10 what they represent to the public, albeit  
11 to the public of Pennsylvania, is indeed  
12 true and authentic.

13 But I guess I would defer to  
14 Delaware as to whether there is an  
15 objection to Your Honor being further  
16 informed on such issues.

17 MR. ROSENTHAL: We have no doubt  
18 that if it was one of our fellow States  
19 that presented the document, it's  
20 presented in good faith or is authentic.  
21 That's not the subject of our concern.  
22 It's simply that we have not had a chance  
23 to look at it and respond knowingly to it.

24 JUDGE LEVAL: You'll have the  
25 opportunity to respond.

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MR. ROSENTHAL: Okay. Thank you,  
Your Honor.

JUDGE LEVAL: Do you have two of  
them for us?

MR. HAVERSTICK: If Your Honor is  
ready for me to proceed?

JUDGE LEVAL: Yes.

MR. HAVERSTICK: So what we have are  
two reports. What we've learned is that  
the State of Delaware has licensed  
entities known as check sellers and money  
transmitters. What struck us about this  
report is MoneyGram is among the 105  
licensed entities. What also struck us  
about this is in Delaware's responses it  
mentioned IPS. IPS is on this list as  
well.

Into that one entity, candidly,  
we're going to have to look at all 105 of  
these to find out how many of them are the  
check sellers or pure money transmitter.  
What are they selling? Where are they  
initiating? This case will expand, just  
on the IPS MoneyGram site into at least

1  
2 105 entities.

3 So what are the other entities  
4 mentioned which is found in the second  
5 report is PNC Bank, NA? PNC Bank is  
6 listed by the Office of the State Bank  
7 Commissioner as among seven national  
8 banks --

9 JUDGE LEVAL: What am I looking at  
10 here?

11 MR. HAVERSTICK: I would direct the  
12 Court's attention to Page 12 of the middle  
13 of report.

14 JUDGE LEVAL: Yes.

15 MR. HAVERSTICK: So this is for  
16 yearend 2015. There were 12 State  
17 chartered banks, seven national banks, 12  
18 out-of-State banks of Delaware Branches,  
19 which totaled to 31 banks.

20 PNC Banks, which was mentioned in  
21 Delaware's pleading, is one of the seven  
22 national banks. So let's just start with  
23 this. If we're going to look at PNC,  
24 we're not looking at one more bank. We're  
25 looking at seven more banks.

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And we have no reason to believe that we shouldn't also look at the State charter and the out-of-State bank of Delaware branches. Now we're up to 130 entities.

If we're going to go down this path and start looking at these other entities that may or may not have instruments that may or may not have gone to these respective States, let's multiply that times 50, and ten years from now we will maybe be out of this phase of the litigation.

But returning to our first point, we think it's entirely unnecessary. We've got 130 banks. Even MoneyGram isn't going to assist anybody in answering the threshold questions, which are; What did Congress mean? What sets the rule of the road?

My last point is that Delaware mentioned that the States have applied these NAUPA, the unclaimed property codes. And they're going to tell us that's what

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2 Congress of 1974 meant. Candidly we think  
3 that's a misdirect. Whatever Congress  
4 meant, Congress meant.

5 I'm not going to stand up here and  
6 explain the codes. They were fronted to  
7 us in the middle district. We thought  
8 about them a little bit before this case  
9 got to the Supreme Court. It's our  
10 understanding that the entities that  
11 escheat to the State apply codes  
12 themselves. So I'm not entirely sure how  
13 or what codes are applied to these  
14 instruments.

15 When Senator Scott of Pennsylvania  
16 in 1973 ran, and he stood up on the floor  
17 of Congress and said, it's unfair for one  
18 State to get the check proceeds from 49  
19 others, I'm not sure that this targeted  
20 discovery on the unclaimed property code  
21 is going to tell us what he meant and what  
22 his colleagues meant when he signed this  
23 in the law in 1974.

24 JUDGE LEVAL: I'm curious about one  
25 thing. I understand from Pennsylvania's

1  
2 brief that, as you were just mentioning  
3 right now, that Pennsylvania introduced  
4 this legislation precisely for the purpose  
5 of stopping escheats of more or less this  
6 nature from going to Delaware so that they  
7 would go to Pennsylvania when the  
8 transaction, went the purchase of the  
9 instruments happened in Pennsylvania.  
10 Right?

11 MR. HAVERSTICK: That is correct,  
12 with the slight distinction at that time  
13 that New York was sort of the State that  
14 was the beneficiary of the majority of the  
15 funds. But other than that --

16 JUDGE LEVAL: It was New York that  
17 was getting a lot of the escheats by  
18 virtue of being the State of  
19 Incorporation?

20 MR. HAVERSTICK: That's correct. It  
21 was Senator Scott, and also the senators  
22 from the Texas. It was their opportunity  
23 to overturn Pennsylvania versus New York  
24 1972 Supreme Court's decision. That's  
25 what they were trying to do, trying to

1  
2 equitably redistribute these funds.

3 JUDGE LEVAL: I see. So what has  
4 been the, to the extent that you know,  
5 what has been the history of the  
6 escheating of these MoneyGram official  
7 checks since the time of the passage of  
8 the Statute?

9 MR. HAVERSTICK: So that is  
10 something of an unresolved issue. We  
11 don't know when MoneyGram started  
12 marketing this product against -- I  
13 referenced a bit ago that tax claim court  
14 case that went up to the Fifth Circuit.  
15 And there is an affidavit filed by  
16 MoneyGram that said they've been in the  
17 business of selling the stamped money  
18 orders to 711, money orders to Walmart,  
19 money orders since 1940. We don't have a  
20 clue of when they started dealing in  
21 official checks. We couldn't tell you.

22 We employed a third-party auditor to  
23 go to MoneyGram and look their  
24 instruments, look at the ones that were  
25 purchased in Pennsylvania and the report

1  
2 back covered a period of, I believe, it's  
3 2003 to 2009. So we at least have that  
4 period of time that we are looking at for  
5 these instruments.

6 I don't know how much longer before  
7 that selling them. I can tell you  
8 MoneyGram had a predecessor, and MoneyGram  
9 as they exist now has a corporate history  
10 that involves a sort of change over merger  
11 that's beyond the understanding. But  
12 certainly there has been some history. I  
13 don't know what the point of origin is. I  
14 don't get the sense that it's 1965 here,  
15 which was the retroactive date of the  
16 Disposition Act. But as I stated here, I  
17 don't know when we started marketing this  
18 product.

19 JUDGE LEVAL: All right. Thank you.

20 MR. HAVERSTICK: So I have a  
21 question for Delaware. There's a paragraph  
22 from your, I think it's your proposed  
23 amended pleading which says: On  
24 information and belief other companies  
25 have erroneously applied 12 U.S.C Section

1  
2 25031, and it wrongly escheated unclaimed  
3 negotiable instruments to Pennsylvania,  
4 Wisconsin, Arkansas, et al., based on the  
5 State of purchase of the negotiable  
6 instruments.

7           These certain other unclaimed  
8 negotiable instruments, including but not  
9 limited to official checks, which were  
10 issued by companies other than MoneyGram  
11 do not fall within the definition of 12  
12 USC 2503.

13           Now, you say on information and  
14 belief, other companies have erroneously  
15 applied and wrongly escheated. What was  
16 that information and belief based on?

17           MS. MOSELEY: To begin with, Your  
18 Honor, the first party to actually  
19 introduce other entities that market  
20 official checks was actually the State of  
21 Pennsylvania.

22           In their pleadings, the Middle  
23 District of Pennsylvania, they brought in  
24 an integrated payment system, which is  
25 referred to as IPS, and PNC as examples of

1  
2 companies they believe who escheated  
3 instruments incorrectly.

4 MR. HAVERSTICK: Your Honor, that's  
5 not true.

6 MS. MOSELEY: And the State of  
7 Arkansas in their complaint they reference  
8 the same thing. We reference the same IPS  
9 to show that there are other entities that  
10 market these.

11 And so the state of Delaware is not  
12 the first party in this action to bring in  
13 the concept that the official check is a  
14 product that encompasses many different  
15 types of checks that are marketed by other  
16 entities other than MoneyGram.

17 And I think the net result of what I  
18 heard, I believe I heard the other States  
19 arguing that this case should be limited  
20 to reviewing and potential distribution of  
21 escheats proceeds from a single entity  
22 which currently escheats as Delaware. But  
23 that Delaware can't possibly bring another  
24 case to see if the escheat proceeds from  
25 other entities at issue in this case

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2 should be perhaps redistributed to  
3 Delaware or other States. Because that  
4 wouldn't rise to the level of cases the  
5 Supreme Court might grant.

6 Which is exactly why we believe this  
7 is a claim that is a compulsory  
8 counterclaim.

9 The essential facts are interlinked  
10 that the discovery necessary for the  
11 original claim and our counterclaim are  
12 the same. And in the interest of judicial  
13 economy and fairness, all of these  
14 decisions should be entered in this case.

15 We would also note, and I apologize,  
16 but we're seeing this for the first time.  
17 By quickly looking through all of the  
18 entities that Pennsylvania thinks is going  
19 to get blown out to, I see on here a  
20 subsidiary of Air B&B, a subsidiary of  
21 Amazon, and it goes on. We don't look at  
22 all these different subsidiaries. They  
23 all escheat under one big corporate  
24 entity. This is not off some huge, long  
25 list. This is not the way it works.

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The information goes into a database using the codes, and that's what we're professing we use, the entities or States that are actually receiving these escheat proceeds.

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And I should say, Your Honor, NAUPA actually even has a code that I believe all other official checks, I believe it's NAUPA Code 15. So it's a code that even is official and captures some of them and calls them official checks. They have cashiers checks and other types of checks listed under that code.

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We've spoken with an expert on UCC. He reviewed a few examples of the MoneyGram checks that Pennsylvania has provided in the Middle District case. And in the examples that he reviewed there were teller's checks under the definition of the UCC. There was a cashiers check under the definition of the UCC. There were some instruments that didn't fall under any definition of the UCC. And this was, I believe, in six or seven examples

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2 taken from the MoneyGram or check.

3 So this notion that there is somehow  
4 a limited universe that can easily be done  
5 in the abstract of legal proposition to  
6 determine whether these instruments are  
7 similar to a money order, I don't believe  
8 it's a fact.

9 And I would note in 1973, this  
10 legislation's specific reaction to money  
11 order, and if you look at 2501 via  
12 statement of purpose and congressional  
13 findings and the declaration of statements  
14 of purpose, 2501 references exclusively  
15 money order and travelers checks.

16 All five sections in 2501, one  
17 through five all reference money orders  
18 and travelers checks. It's only in 2503  
19 that the language comes into play.

20 And so as to what Congress meant in  
21 1973, we have 44 years of practice. These  
22 States actually accepted escheat funds.  
23 And the fact that in 2006 the State of  
24 Ohio was included in --

25 JUDGE LEVAL: I'm sorry. 44 Of who

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accepting these escheat funds?

MS. MOSELEY: All of the different States that are before Your Honor have been receiving escheats under these NAUPA codes related to this checks, one of which is an official check code.

We have 44 years of practice as to how they handled handled escheats. And Ohio --

JUDGE LEVAL: You're saying those are escheats that should have been going to you?

MS. MOSELEY: We're saying that's the purpose of discovery. We have the Statute that specifically references money orders and travelers checks with one exception for third-party bank checks and a similar instrument.

We have 44 years of practice of how the agency has been challenging the escheat of money orders and MoneyGram official checks to Delaware under the Statute.

We have 44 years of practice of how

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2 they have been interpreting that Statute  
3 for their own incorporated banks.

4 We believe that is directly  
5 relevant, and the Supreme Court said that  
6 is directly relevant under the bank court  
7 case I cited earlier.

8 We would note that Ohio, which is  
9 one of the States in the coalition,  
10 actually asked MoneyGram about this in  
11 2006. There was an exchange of letters  
12 between the State of Ohio and MoneyGram  
13 about the escheat of their official check  
14 product.

15 MoneyGram responded to Ohio that it  
16 was a third party bank check and therefore  
17 was excluded from the escheat States of  
18 our incorporation. That was over a decade  
19 ago. And now Ohio is saying that was  
20 wrong, and it should come back to us.

21 They didn't follow up. They didn't  
22 change nothing. It is not a secret what  
23 MoneyGram has been doing. And now they  
24 are saying before you this case should  
25 deal exclusively with MoneyGram

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2 instruments that are escheated to  
3 Delaware.

4 And by the way, Delaware can't  
5 possibly seek to look at the other  
6 instruments or entities other than  
7 MoneyGram for the purpose of the escheat.

8 JUDGE LEVAL: All right. That's  
9 another issue that's been raised by the  
10 motions is the propriety of bifurcation  
11 both with respect to the judgments and  
12 with respect to discovery.

13 And I would like to hear from you,  
14 first, with respect to judgments. I think  
15 these are different issues.

16 It's my understanding, first of all,  
17 that all parties are agreed that it would  
18 be desirable to have a bifurcation with  
19 respect to judgement so that there would  
20 be a first stage of judgment presumably  
21 rendered on a summary judgment on  
22 reciprocal summary judgment motions.

23 Both sides claiming that with  
24 respect to their claims for declaratory  
25 relief, that the instruments in question

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2 in this case either are or are not within  
3 the scope of the statute. Is that  
4 correct?

5 MR. DISHER: Yes, Your Honor. Todd  
6 Disher from Texas. That is correct. It's  
7 the position of the Defendant States --  
8 I'm going to have to train myself to get  
9 that right.

10 It's the Defendant States' position  
11 that this case should first proceed on the  
12 legal question of whether this type of  
13 instrument falls within the Statute. Get  
14 a decision on that, and then have a  
15 separate portion of the proceeding where  
16 we deal with each State's claim against  
17 Delaware, assuming that liability is  
18 determined in our favor.

19 MR. HAVERSTICK: Pennsylvania shares  
20 in that view, Your Honor, that the  
21 necessary predicate, before we can sort  
22 out any of the particulars, is to define  
23 what Congress meant by the term  
24 "third-party bank check." What Congress  
25 means by a similar written instrument,

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2 money order, travel checks, we also have  
3 to determine that.

4           Only after this Court decides those  
5 foundational issues could we move onto a  
6 next stage where we compare your hallmarks  
7 of what each of those things mean against  
8 eight particular instruments. For  
9 instance, like in this case, the MoneyGram  
10 official check.

11           MR. ROSENTHAL: Stated the way they  
12 have stated it, we do not have an  
13 agreement. We believe that when they said  
14 there would be division between liability  
15 and damages, that did not -- that was not  
16 something we were inclined to oppose. But  
17 what they have defined is something very  
18 different, which is that somehow there's a  
19 belief that there is a legal issue, that  
20 Your Honor could impose precise legal  
21 issue that off of top of your head and  
22 just by looking at some supposed  
23 legislative materials, Your Honor is going  
24 to be able to define what is a money  
25 order, what is a simple instrument, and

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2 what is a third-party bank check. And  
3 therefore come up with a legal judgment.

4 And that there would be a second  
5 phase of the case where you would look at  
6 various instruments and determine whether  
7 that complies with legal --

8 JUDGE LEVAL: You, like your  
9 adversaries, contemplate moving for  
10 summary judgment as a matter of law on a  
11 declaratory judgment that the instruments  
12 issued by MoneyGram either go pursuant to  
13 the Statute or go pursuant to the Supreme  
14 Court code. Isn't that correct?

15 MR. ROSENTHAL: We would anticipate  
16 getting a definition, not just with  
17 MoneyGram, but for related --

18 JUDGE LEVAL: But you had filed a  
19 suit that addresses MoneyGram. And one of  
20 the issues that we are discussing is  
21 whether to grant your motion to expand the  
22 subject matter of the suit to other  
23 instruments not issued by MoneyGram.

24 But so far as the case before me  
25 right now is a case that disputes the

1  
2 escheats of MoneyGram's so called  
3 efficient checks. And I understood from  
4 your findings that you anticipate moving  
5 for summary judgment saying that those go  
6 to Delaware.

7 MR. ROSENTHAL: I do. But I'm  
8 trying to make a distinction which is  
9 contrary to the distinction that's drawn.

10 I do agree that we should have  
11 liability. Liability is not purely a  
12 legal issue. It will require the  
13 ascertainment of facts. It requires the  
14 ascertainment of testimony and also  
15 perhaps legal --

16 JUDGE LEVAL: I didn't understand  
17 anybody to say otherwise.

18 MR. ROSENTHAL: Well, if we do not  
19 have a misunderstanding on that issue, I  
20 think in fairness, Your Honor, I was  
21 listening. I think the other side  
22 contemplates that this will be parsed  
23 into -- in fact, I remember Mr. Haverstick  
24 saying we will go through this legal  
25 issue, and then we will compare particular

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2 instruments to see whether they fall under  
3 that category. That will be a second  
4 phase. No.

5 The instruments would be part of  
6 Phase I, liability. We would come out of  
7 this with the determination, in our view,  
8 when Your Honor renders your judgment in a  
9 statement saying, with knowledge of what  
10 the panoply of instruments consist of, are  
11 those within the Statute or without the  
12 Statute? If that's what we are talking  
13 about, then we agree.

14 JUDGE LEVAL: "Panoply of  
15 instruments" what are you envisioning as  
16 falling within the "panoply of  
17 instruments" as the case is currently?

18 MR. ROSENTHAL: As the case is  
19 currently, panoply is what has been  
20 labeled official check. But the official  
21 check has been applied to what we viewed  
22 to be a number of different underlying  
23 instruments. Some are like, for example,  
24 tellers checks; some are like cashiers  
25 checks.

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JUDGE LEVAL: Are you saying official checks of MoneyGram?

MR. ROSENTHAL: Of MoneyGram. It's not just a single instrument of MoneyGram. So when I say panoply, I'm not saying anything outside the scope of what we originally pleaded.

JUDGE LEVAL: Right.

MR. ROSENTHAL: And if we are all on the same wavelength here, by liability meaning a determination of which of those instruments fall in one category, and which of those instruments fall in another category, then we have a union --

JUDGE LEVAL: You're saying that the instruments issued by MoneyGram, which everybody knows and everybody agrees are the subject of the case as it now stands, without reaching Delaware's motion to expand the pleadings, you're saying that those are not just a single category of instruments, but there are lots of different categories?

MR. ROSENTHAL: There are not the

1  
2 1,000 different sleuth of instruments that  
3 the other side indicated. They are a  
4 discrete number which this Court can  
5 easily get its hand around.

6 But if the answer is at the end of  
7 the liability this Court says I have  
8 interpreted the Statute in such a way that  
9 these instruments fall on this category.  
10 These instruments fall on this category.  
11 And maybe there's a third category. Then  
12 we are in agreement.

13 But if what the other side is  
14 talking about is that there really is kind  
15 of an abstract legal determination made  
16 based on known facts. Based on no  
17 testimony --

18 JUDGE LEVAL: Can I ask them?

19 MR. ROSENTHAL: Yes, Judge.

20 JUDGE LEVAL: Are you contemplating  
21 a judgement based on no facts and no  
22 instruments and no -- what were the other  
23 things you said? No evidence?

24 MR. ROSENTHAL: No, no, Judge --

25 JUDGE LEVAL: I didn't understand

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that you were.

MR. DISHER: Your Honor, no. We are not contemplating that at this time, Your Honor.

JUDGE LEVAL: Motions for summary judgment as opposed to motions under 12(B)(6) generally do involve facts and generally do involve considerable factual issues. If there are material factual issues in dispute, it generally means that summary judgment can't be granted. But when material factual issues are not in dispute, judgement can be rendered as a matter of law.

And I certainly was not, and didn't understand counsel for the other States to be arguing otherwise.

I was simply asking whether there is anybody who disagrees with the proposition that after you have done the discovery that is appropriate to determine as a matter of law whether, however many different instruments MoneyGram issues under this category's name of official

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2 checks, however many there may be, those  
3 will be adjudicated, if possible under a  
4 summary judgment; a summary declaratory  
5 judgment without reaching the issue of who  
6 has to pay who how much money.

7 MR. ROSENTHAL: Your Honor, one  
8 would predetermine this discussion. With  
9 that understood, we have no objection on  
10 the part of Delaware. That was not  
11 precisely what I heard, but the way Your  
12 Honor has stated it is perfectly  
13 acceptable to us.

14 JUDGE LEVAL: Now, one thing that  
15 may result in some kind of dispute is that  
16 Delaware has been saying in this argument  
17 that in order to adjudicate how the  
18 various MoneyGram instruments that may be  
19 in dispute, that are in dispute in this  
20 case are adjudicated, it's necessary to  
21 look at how various states escheat  
22 instruments issued by other companies.

23 And I don't know whether the other  
24 side -- I suspect you disagree with that;  
25 is that right?

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MR. DISHER: That is correct, Your Honor.

JUDGE LEVAL: Well, I'm not going to adjudicate that now. As a logical proposition I'm not sure that there may not be some relevance to such evidence.

So I'm not going to make any ruling on it at present, but I may have to do it later if you have a dispute about Delaware's discovery directions.

Now, another issue about bifurcation that we have not only addressed, but haven't ruled on is the bifurcation of discovery.

Because Delaware has been arguing -- and correct me if I'm mistaken. But I understood Delaware's argument to be that even though Delaware agrees that there should be a summary judgment with respect to the instruments that are the subject of the dispute, declaratory judgment as to whether they go under the Statute or fall under the exception, Delaware has argued in its papers that before reaching that

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2 summary judgment, the discovery should be  
3 wide open without restriction on the  
4 subject, that discovery should address  
5 issues of ultimate liability without  
6 restriction. Is that Delaware's position?

7 MR. ROSENTHAL: The position you  
8 stated is accurate, but I think needs to  
9 be put in context. Our position really is  
10 that in seeking the discovery on  
11 liability, Your Honor, which are included  
12 these NAUPA reports, we will necessarily  
13 be getting the numbers as well. It's part  
14 and parcel of the same documents.

15 And what we think is, rather than go  
16 to the States, rather than go to the third  
17 parties to get the information -- first of  
18 all try to separate off the numbers from  
19 the substance -- we go once and ask them  
20 for their documents which will include the  
21 numbers.

22 The purpose is not for damages  
23 purposes, but we don't want to be faced  
24 with the argument that we will only  
25 provide you part of a document, or you

1  
2 can't get this discovery because it goes  
3 to damages.

4           What we would like to do is go once  
5 to everybody. Get the relevant documents,  
6 which are not -- this is not massive  
7 discovery we are talking about. This is  
8 not a large-scale discovery as you would  
9 imagine. And we would be using those  
10 documents for liability purposes.

11           If the case goes no further, we are  
12 not going to be doing number calculations.

13           But then if we get to the point  
14 where we get to numbers, damages, amounts  
15 that need to be placed back and forth, we  
16 revisit the same document and use them for  
17 number purposes.

18           So we don't view this as wide open  
19 discovery. We just simply want to do it  
20 one time and one time only. When we go to  
21 them, we want to get the NAUPA reports  
22 from them. And those will necessarily  
23 include the numbers. When we go to  
24 MoneyGram, or IPS, or PNC, or whatever  
25 other individuals we identified, we only

1  
2 want to come to them on one occasion.  
3 Give them one set of documents.

4 And, obviously, Your Honor, if  
5 either side, us or the other side, start  
6 to view this as being unreasonable that  
7 we're going beyond what we represent here,  
8 that's a matter to be revisited.

9 But our argument is basically in  
10 terms of just efficiency in terms of the  
11 practicalities, the documents we went are  
12 a discrete set, and they necessarily  
13 include the numbers along with matters we  
14 view as liability.

15 JUDGE LEVAL: Are you saying that  
16 the numbers are already part of the  
17 documents that you seek?

18 MR. ROSENTHAL: Yes. The documents  
19 we anticipate getting -- well, the NAUPA  
20 reports, when we ask for the NAUPA  
21 reports, they're going to include the  
22 classifications that people place.

23 And so in order to answer the  
24 liability question, you also get the  
25 numbers as part and parcel of the same

1  
2 thing. Because did they file for cashiers  
3 checks? Did they file for official  
4 checks? How did people report them?

5 JUDGE LEVAL: What is the word you  
6 used?

7 MR. ROSENTHAL: I keep using the  
8 word N-A-U-P-A.

9 JUDGE LEVAL: And that stands for?

10 MR. ROSENTHAL: That stands for the  
11 National Association of Unclaimed Property  
12 Administrators. They have a common forum  
13 that is used throughout the States for the  
14 reporting of unclaimed property.

15 And what we will be seeking in  
16 discovery is the reports that report in a  
17 very small number of categories, that  
18 would be potentially relevant to the  
19 issue, whether framed in the narrow way or  
20 a broad way. But it would include  
21 official checks, tellers checks, cashiers  
22 checks --

23 JUDGE LEVAL: Those reports are  
24 filed by each State? So each State has  
25 such a report?

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MR. ROSENTHAL: The reports they're blank forms. When you are the holder of unclaimed property and you submit the report required by State law, you generally submit a report on a NAUPA form.

Is it every State? I think it's most every State. And they go into a database with most States, they're are actually compatible databases that the various States have. And that's going to be an important subject for our discovery.

JUDGE LEVAL: Those are not public documents?

MR. ROSENTHAL: I don't know whether we could get them by --

JUDGE LEVAL: They're not simply filed and, say, available to the public?

MR. ROSENTHAL: Are they available? I don't know the status of that in every State.

JUDGE LEVAL: Does Delaware have such a system?

MR. HAVERSTICK: Your Honor, I think there's a misunderstanding.

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MR. ROSENTHAL: Please don't interrupt me.

MR. HAVERSTICK: I beg your pardon, Your Honor. I'm actually trying to help you. I think these are holder reports. Meaning they're not held by a State. They're held by the MoneyGrams of the world. So if I'm right, a four-year report is not going to do anybody any good.

MS. MOSELEY: The reports are prepared by holders and filed with the State. So they are actually on file with the State.

MR. ROSENTHAL: They are filed on the States, and I'm informed that these are non-publicly disclosed, because, for example, the State of Delaware keeps confidential under State law the identities and the amounts paid by individual holders to the State. It's a confidentiality statute.

Obviously if it's confidentiality, for those States that are in competition

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2 with each other, they can be kept highly  
3 confidential, if that's the necessity.

4 But the point we are making is and  
5 the reason we took the position we took is  
6 we're not opposed, Your Honor, to a  
7 division between liability and damages.

8 Indeed we think that's probably the  
9 wise way to go. But we are opposing today  
10 going to everybody twice and basically  
11 getting documents, the same documents with  
12 would contain both numbers. And through  
13 those numbers present to us and to you,  
14 Your Honor, how States and our holders are  
15 reporting with respect to particular  
16 instruments under their understanding of  
17 the Statute. Thank you, Your Honor.

18 MR. DISHER: Few things, Your Honor.  
19 First, that position is different than the  
20 position that they took in their joint  
21 commission that was filed last week.

22 In the joint commission they called  
23 for a single unified discovery process.  
24 They don't try to define what the first  
25 phase of discovery would look like. They

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2 say it's all wrapped up together so that  
3 we can do it all at the same time.

4 If that's the case, there is simply  
5 no reason to bifurcate. Because the point  
6 of bifurcation is we have a limited  
7 discovery period and window on the  
8 characteristics of these negotiable  
9 instruments, which MoneyGram itself  
10 recognizes is just based on a few distinct  
11 facts that probably will be undisputed;  
12 who is the holder? Who is the payee? Who  
13 is the payee? Things of that nature.

14 And all of that can be obtained  
15 through MoneyGram. And if there's any  
16 differences between individual types of  
17 official checks, all of that information  
18 is housed with MoneyGram. And I would ask  
19 you to look at the briefings they have  
20 filed in this case, because MoneyGram  
21 itself has never tried to distinguish  
22 between more than one type of negotiable  
23 instrument that falls within the official  
24 check category.

25 So discovery for this liability

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2 phase can be very limited and very quick.  
3 We just need to know a few key  
4 characteristics about what the negotiable  
5 instruments are and what they do, that  
6 MoneyGram label as official checks.

7 And if Delaware really agreed with  
8 us on that point, they wouldn't be asking  
9 for the 17 months of discovery that they  
10 are asking for in the joint commission  
11 that was filed last week.

12 We think we can do that in four  
13 months at most. Because, again, it's just  
14 discrete factual questions that play into  
15 the larger legal issue. And all of these  
16 facts can be attained through MoneyGram.  
17 And MoneyGram has represented that it is  
18 willing to help us obtain that fact, those  
19 facts, and help us with any report and  
20 analyses that we need done.

21 So we think discovery in the first  
22 phase can be done quickly, as long as it  
23 is truly limited to the ultimate liability  
24 question in this case.

25 JUDGE LEVAL: All right.

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MR. VOSS: Your Honor, If I may --  
again, Joshua Voss for the State of  
Pennsylvania. I just want to make a  
specific distinction that I think is  
important to understand the issues.

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Whatever instrument it is; an  
official check, a money order, a valuable  
napkin, if you know where the owner of  
that lives, it goes to that State.

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So you can have an official check  
that's going to Pennsylvania, because you  
know it's better to submit in Norristown.  
So of course it's going to be reported in  
Pennsylvania, regardless of what an  
official check is.

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So it's important to know that of  
our 151,022 instruments that we're trying  
to get back from Delaware, those are  
audited, owner unknown instruments, which  
puts them in the Statute.

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The rule is it remains. If you know  
who owns it, it escheats or it goes into  
the custody of that State.

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So this is a bit more of a buck shot

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2 proposal than Delaware is letting on. We  
3 audited MoneyGram's filings and determined  
4 these are the owner unknown. They should  
5 be coming to us under the Statute. It's a  
6 fine point. It's a distinct point, but we  
7 thought it worth making.

8 MR. ROSENTHAL: If I can just take  
9 one moment to respond. That was a good  
10 point, but it wasn't relevant to the issue  
11 in front of you.

12 Yes of course there are owner  
13 unknown. The question is: Of those  
14 105,000, how much of them fall within the  
15 Disposition Act, and how many do not?

16 That's the issue in front of you.  
17 The issue is how do you parse one from the  
18 other?

19 The only additional point I want to  
20 make is that this is not an effort to try  
21 to even delay this or unreasonably expand  
22 this in a way that will not lead to a  
23 comprehensive result.

24 We, Delaware, more than, we suspect,  
25 the other side want a resolution.

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We know as a practical matter, Your Honor, that you will not have the facts you need, the practical information you need by doing some truncated discovery which is artificially limited the way the Plaintiffs suggest.

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Let me recommend, Your Honor, that instead of trying to determine liability and trying to determine legal issues before the discovery takes place, which is what really the other side wants to do, they have this legal construct. They say, Please accept our legal construct, and here is what the discovery will be.

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We've gone into it by saying, We want to have the discovery so that both sides are going to be able to argue the legal issues of effectively. And we have not tried to impose our legal construct on anyone's discovery. And that's exactly what they're trying to do.

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We would ask Your Honor that on this issue of the discovery, that Your Honor set a period of time for the discovery.

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2 Let it play out a little bit. Your Honor,  
3 I am confident from your experience, will  
4 be able to keep adequate control of the  
5 parties. And if this thing, which we do  
6 not believe will ever take place, somehow  
7 metastasizes in an unexpected way, you can  
8 call us back.

9 But for Your Honor to accept their  
10 construct, impose it on discovery, and  
11 leave us filing motions with facts we  
12 believe are irrelevant, undiscovered, and  
13 un-presented, seems to us to be  
14 undercutting the entire process.

15 Therefore we would ask that Your  
16 Honor leave this an open-ended discovery  
17 period. We're not asking for 17 months of  
18 discovery. We're asking that the factual  
19 period be a period of a year, because we  
20 know, as a practical matter, how long it  
21 takes.

22 You can agree or disagree, but we  
23 know the four months they are saying for  
24 fact discovery won't even begin to permit  
25 us to get the discovery we are seeking.

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2 Thank you.

3 JUDGE LEVAL: Well, let's proceed  
4 now to hear argument on Pennsylvania's  
5 motion to implead MoneyGram.

6 MR. HAVERSTICK: Thank you, Your  
7 Honor. Matthew Haverstick again for the  
8 State of Pennsylvania.

9 Your Honor, I feel compelled to,  
10 before I get to the motion Pennsylvania  
11 made regarding MoneyGram, to remind the  
12 Court, and I think something I heard from  
13 you earlier on -- we're not asking you to  
14 draft a construct on anyone. Delaware has  
15 sued Pennsylvania and Wisconsin over the  
16 MoneyGram product; not the MoneyGram, the  
17 NPS, the PNC bank, not all the other  
18 things out there that they could find by  
19 doing discovery. That's their lawsuit.  
20 They sued Pennsylvania.

21 And we know the discrete numbers of  
22 things that we're talking about when we  
23 talk about this MoneyGram issue. We know  
24 what they are. And they know what they  
25 are. They sued us over it.

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So I understand and trust that the Court will set an appropriate discovery schedule. But the idea that it should be open-ended and free form just seems so out of whack with the complaint they filed against Pennsylvania, which was not open-ended and free form. It was quite discrete; it was quite tight.

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I will attempt to be -- we have been here for a bit, and I imagine Your Honor is probably sick of hearing all this drone. I will try to make my argument brief with respect to the inclusion of MoneyGram in the case, because I actually think it is a rather simple issue and a very practical one, Your Honor.

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Pennsylvania believes that should it prevail, it may not be able to obtain the relief that it would otherwise be entitled to if MoneyGram is not made a party to Defendants, at least until such time as the Court determines whether Pennsylvania and the other States must proceed against MoneyGram to recover outstanding sums or

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2 must, or may recover those.

3 JUDGE LEVAL: Why would you say you

4 would not be able to get relief if

5 MoneyGram is not in the case?

6 MR. HAVERSTICK: Here's why I

7 venture to guess that of my colleagues

8 sitting to my right representing Delaware

9 and MoneyGram, neither of them today

10 stipulate that for the 10 million odd

11 dollars that MoneyGram already escheated

12 to Pennsylvania, that should Pennsylvania

13 prevail on that piece, I'll call it the

14 back rent, that either of those parties

15 will obligate itself today to pay us the

16 back rent.

17 I would expect that they would both

18 say, No. We are not agreeing to that.

19 Maybe we will, and maybe we won't. Maybe

20 we have to, and maybe we don't.

21 I can tell as Pennsylvania has pled

22 in the third-party complaint, there

23 certainly is an argument that under NAUPA

24 and Pennsylvania State Law, and indeed

25 Delaware State Law, our actions run as to

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the whole, which is MoneyGram.

If Pennsylvania were to recover or to capture money that is supposed to be escheated to Pennsylvania, Pennsylvania is required to proceed against the holder.

Now, we have plead in the alternate in our action, and we may have a direct cause of action against Delaware. But, candidly, the Court hasn't addressed which legal theory --

JUDGE LEVAL: Let me just interrupt you. No. Go ahead. Go ahead.

MR. HAVERSTICK: So we believe that to recover we must recover first from MoneyGram as the holder, and then MoneyGram receives indemnification from Delaware under Delaware's indemnification statute, which requires Delaware to indemnify a holder, if that holder is required to move money already escheated to Delaware to another State.

Delaware, in other words, does not directly reimburse the state. If Delaware wrongfully escheats money, it's required

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2 to indemnify the holder, and then  
3 presumably the holder pays it over to the  
4 State demanding the money.

5           Again, at this early stage pleadings  
6 for the back rent, we don't know yet who  
7 is obligated or who will accept an  
8 obligation to physically remit the money  
9 to Pennsylvania, whether indemnity is  
10 required or not. But that is only part of  
11 our concern, Your Honor.

12           There are two other facets to the  
13 case, as the Court knows, that need to be  
14 considered. The first is that MoneyGram  
15 is right now retaining funds that should  
16 be escheated somewhere; Pennsylvania,  
17 Delaware, or Mars. I mean, you're going  
18 to figure it out. But MoneyGram has that  
19 money, and has agreed for now to not  
20 escheat it anywhere, pending the outcome  
21 of this litigation.

22           And furthermore, presumably some day  
23 this Court will arrive at a legal  
24 conclusion about whether MoneyGram should  
25 be escheating money so that in the year

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2 '21, '22, well hopefully not that long.  
3 But down the road Delaware and MoneyGram  
4 and Pennsylvania and all the other  
5 Coalition States will know where MoneyGram  
6 should be sending the money.

7 And that's all well and good. But  
8 unless MoneyGram is a party to this  
9 action, the Court doesn't have any legal  
10 ability to compel MoneyGram to do  
11 anything.

12 So while MoneyGram today and  
13 MoneyGram's counsel today may agree with  
14 everyone in the courtroom, then yes, once  
15 you've decided where the money should be  
16 escheated, Delaware will follow that rule  
17 absolutely. There is no way we're going  
18 to be coming back in here with serial  
19 litigation to compel them to do that.

20 Similarly, if the Court decides that  
21 MoneyGram -- when a Court decides what  
22 state MoneyGram should be escheating to,  
23 the only way to guarantee to all of us in  
24 the courtroom today that MoneyGram will be  
25 finally, definitively obligated to do that

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2 is if MoneyGram is a party.

3 Now, there's been concern raised  
4 about the due process rights of MoneyGram,  
5 and we certainly acknowledge those  
6 concerns. Indeed we embrace, and that's  
7 the reason we believe MoneyGram needs to  
8 be a party.

9 The one and only way, in our view,  
10 that MoneyGram may insulate itself from  
11 the possibility, the prospect of having to  
12 pay twice on these instruments as to  
13 Pennsylvania, is if it's here in a chair  
14 as a party, and at the end of the case if  
15 Pennsylvania prevails and ordered to make  
16 sure MoneyGram doesn't pay twice.

17 Here's a hypothetical. If MoneyGram  
18 is not a party to the case, at the end of  
19 the case, the Court made determine  
20 Delaware should not have that initial ten  
21 million dollars escheated to Delaware.  
22 And Pennsylvania you're owed.

23 Delaware may take the position,  
24 Well, we're not paying Pennsylvania. You  
25 have to go sue MoneyGram. And then we

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2 have a serial litigation problem.

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4 We also potentially have a problem  
5 with if there's litigation as between  
6 Delaware and MoneyGram and Pennsylvania  
7 and MoneyGram somewhere else, that there  
8 may be a determination that MoneyGram was  
9 supposed to pay Pennsylvania. And  
10 somewhere else there may be a  
11 determination that MoneyGram was supposed  
12 to pay Pennsylvania, and it's a  
13 possibility of a double pay.

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15 That goes away if MoneyGram is here  
16 today and stays here today at the table.

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18 And while we recognize that there's  
19 a due process right not to pay twice,  
20 MoneyGram does not have a due process  
21 right to not be named as a defendant,  
22 especially when we believe it's a  
23 potentially necessary party. And we are  
24 in the stage of litigation where we don't  
25 know whether the Court will require  
26 MoneyGram to repay Pennsylvania and then  
27 be indemnified by Delaware. Or whether  
28 there will be some other methods to move

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2 the money around.

3 So we don't think at this point in  
4 time it's especially onerous. It's  
5 certainly consistent with due process for  
6 MoneyGram to stay as a party opponent, at  
7 least at this time.

8 JUDGE LEVAL: Thank you. Before I  
9 hear from MoneyGram, what is the position  
10 of Delaware with respect to in the event  
11 that this Court, and by this Court, I mean  
12 in this instance the Supreme Court,  
13 determines on a recommended judgment --  
14 with or without my recommendation, if the  
15 Supreme Court determines that Delaware  
16 receives escheats that should have gone to  
17 other states, is Delaware not ready to  
18 turn what it got over to the other States?

19 MR. ROSENTHAL: Of course not, Your  
20 Honor. I mean, we are a Sovereign State  
21 we will honor, of course, any judgment  
22 entered by the Supreme Court. If the  
23 Supreme Court says at the end of the day  
24 that we owe Mr. Haverstick's client  
25 \$10 million, we will pay \$10 million.

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And let me point out, Your Honor, we have taken no position on the motion here. But in the past, it is my understanding, and I'm certainly open to correction on any side, that in the Three Trilogy cases, judgments were entered by the Supreme Court that operated among the States.

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There was certainly underlying money in Pennsylvania. We know there was Western Union money orders.

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I can't tell you, Your Honor, whether Western Union was a party and made subject to a decree. But the judgments in the case operated intrastate between the States.

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So, Your Honor, no Sovereign State is going to come in front of a Supreme Court, at least, in this day and age, certainly, certainly not Delaware, and say we're not going to honor a decree.

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JUDGE LEVAL: So another question I have is: How does an escheat work? Does a State demand escheat, or is it that the holder of the unclaimed property is simply

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2 expected on its own to render the  
3 unclaimed property to the appropriate  
4 State?

5 MR. ROSENTHAL: Well, I think  
6 there's an expectation and an  
7 understanding as to how these escheat  
8 rules are supposed to function.

9 In practice, and I've seen it with  
10 respect to MoneyGram, there is uncertainty  
11 about where the funds should go.

12 MoneyGram indeed earlier requested  
13 Delaware an opinion. Should I send it to  
14 you? Should I send it somewhere else?  
15 Delaware said, Send it to us.

16 Your Honor, what I think I heard  
17 was --

18 JUDGE LEVAL: Delaware said send it  
19 to Delaware?

20 MR. ROSENTHAL: Right, correct.  
21 What I think I heard from counsel is that  
22 Delaware has committed itself to  
23 satisfying a judgment directly to the  
24 Commonwealth of Pennsylvania and all the  
25 other States if we all prevail. If

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2 that's -- if that's my understanding, and  
3 that's part of what Delaware is prepared  
4 to stipulate today, that's great.

5           However, it doesn't solve entirely  
6 the problem, because we still have the  
7 matter of the money that MoneyGram is  
8 holding onto right now that continues to  
9 accrue, and potentially escheats  
10 somewhere. Plus requiring, indeed  
11 ordering, MoneyGram to in years' future  
12 obey whatever decree or order this Court  
13 comes up with.

14           So, again, I appreciate Counsel's  
15 candor, and I think that's very helpful if  
16 that's what truly was meant in assuaging  
17 perhaps some of the concerns that  
18 Pennsylvania and the Coalition States have  
19 about their ability to get relief or  
20 remedy along with judgment.

21           But, again, it's partially complete.  
22 And it doesn't solve the problems with  
23 MoneyGram, at least at this stage of the  
24 action, needing to be in the case.

25           JUDGE LEVAL: Well, let's hear from

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MoneyGram.

MS. MOSELEY: Your Honor, just quickly in answer to your question, escheats are very much like income tax.

JUDGE LEVAL: What's that?

MS. MOSELEY: Escheats are very much like income tax, Judge. You are expected to comply with the law and file the report. States maintain the right to honor on the compliance, and that's very much similar.

MR. RATO: Good afternoon, Your Honor. Michael Rato for MoneyGram. I just want to address briefly the motion that has MoneyGram as a party.

Essentially, as various parties have pointed out at various times, the case involves a legal issue over which State has the right to get certain money that originated with MoneyGram or originated with MoneyGram's customers.

That is not property in which MoneyGram has claimed any interest. Once it becomes escheat, we are not trying to

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keep the money.

We are not, other than as an intellectual exercise, taking a position and do not intend to take a position on which State has priority to take these funds.

It is our view that we will essentially wait for the Court to make a determination, and we will obviously follow that determination.

To the extent that there's any concern of the property that originated with MoneyGram, again, the past and the ongoing, let me address them separately.

With respect to the property that is currently in MoneyGram's possession that is undergoing; either is becoming dormant or has become dormant that is still in MoneyGram's possession, MoneyGram does not need to be subjected to the jurisdiction of the Court when it has agreed and will agree to voluntarily turn over that property to any entity in which the Plaintiff and Defendant States agree.

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2           We have made that offer several  
3 times. We are not trying to keep the  
4 property. We are not trying to take any  
5 benefit from it. We are waiting for the  
6 States to agree on where we can send it  
7 while they resolve the dispute.

8           JUDGE LEVAL: Have you ceased to  
9 make escheat payments?

10          MR. RATO: Your Honor, we have not  
11 entirely.

12          JUDGE LEVAL: With respect to  
13 official checks.

14          MR. RATO: Certainly there are  
15 other -- well, yes. With respect to  
16 official checks for the most part we have.

17          The distinction is that there is  
18 property that is escheatable to Delaware,  
19 and given that Delaware has a shorter  
20 dormancy period than that of some other  
21 States for which MoneyGram has received,  
22 in addition to the statutory  
23 indemnification, contractual  
24 indemnification from the State of Delaware  
25 for those funds.

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We have asked the various States for extensions to not have to report that fund, not report those funds and not be penalized. And some States have granted them, and ultimately in our last request to Delaware, they did not grant that extension. And so we were forced to turn over the funds. And we did so.

Going forward however, again, as soon as an entity tells us, or the parties agree on where we can send those funds and not be penalized by any States, we will do so.

And that offer stands. That doesn't require us to be a party. We will voluntarily submit the property to the jurisdiction of the Court. So that we are taken out of the middle of this.

It is MoneyGram's desire to simply not be caught and threatened with penalties and interests by the complaining States or by the complainant and Defendant States.

JUDGE LEVAL: You say that you have

1  
2 expressed willingness to pay the money to  
3 wherever the Court says you can?

4 MR. RATO: Correct. And what we  
5 offered in particular, Your Honor, was if  
6 there were a, for example, a financial  
7 institution, a third-party agent, some  
8 entity that the States collectively;  
9 Delaware, the Coalition, Pennsylvania,  
10 Wisconsin could agree, we could just  
11 report and remit the property every year  
12 going forward while this litigation  
13 proceeds. We would be pleased to do so.  
14 Pleased is an understatement.

15 JUDGE LEVAL: I was going to ask  
16 about that. One of the things that was in  
17 dispute in your papers was MoneyGram said  
18 in its argument against being in the  
19 pleading is that this litigation involves  
20 only money that had previously been paid  
21 by you to Delaware. And Pennsylvania  
22 answered that that was not true.

23 And that looking at the last, I  
24 think it's the last paragraph of  
25 Pennsylvania's prayer for relief in its

1  
2 proposed complaint against MoneyGram,  
3 addresses the issue of funds that have not  
4 been paid to Delaware. I forget exactly  
5 how you put it or how Pennsylvania put it.

6 But MoneyGram is proposing this, as  
7 I understand it, to pay the funds that  
8 have not previously been paid to Delaware  
9 into an escrow fund?

10 MR. RATO: Absolutely, Your Honor.

11 JUDGE LEVAL: So what's wrong with  
12 that as far as Pennsylvania is concerned?

13 With respect to the money that was  
14 not sent to Delaware, what's wrong with  
15 that, having MoneyGram pay it into an  
16 escrow fund to be distributed in  
17 accordance with the judgment of the  
18 Supreme Court?

19 MR. HAVERSTICK: Well, it might be,  
20 Your Honor. But it's news to me that's  
21 less than five minutes old that MoneyGram  
22 continues to remit unclaimed property  
23 that, I think, potentially could be  
24 subject to this litigation to Delaware  
25 apparently in some sort of In terrorem

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threat by Delaware. I find that --

JUDGE LEVAL: Is that correct?

MR. RATO: Your Honor, the way --  
let's take a step back. You asked about  
how the unclaimed property, unclaimed  
property loss operated on a holder.

As someone representing a holder  
here, I can explain that. Essentially in  
almost every State, with the exception of  
Mississippi, who I think is here; maybe  
you are.

There's an annual reporting  
deadline. And so on X date when property  
becomes due to a particular State, you  
file an annual report, and you remit the  
property; without being demanded, without  
being asked.

The States do, of course, retain the  
right to perform an audit. Since the  
litigation has started, it had been  
MoneyGram's practice to go to Delaware and  
Pennsylvania and some of the other States  
involved to seek an extension of the  
reporting deadline. Again, those reports

1  
2 are due essentially every year.

3           When those reporting deadlines come  
4 up, we ask for extensions. We say,  
5 listen. We understand that there is a  
6 dispute. We will escheat everything out  
7 for this year, but we would like to hold  
8 back the official checks, understanding  
9 that there's a dispute.

10           The last time that we attempted  
11 to -- well, when asked for that final  
12 extension from the State Of Delaware,  
13 instead we were told that Delaware would  
14 enter into an agreement whereby they would  
15 expressly provide us with indemnification.

16           Thus far, which is one of the  
17 reasons we think it would be unduly  
18 burdensome to the litigation to add us, to  
19 add that additional indemnification issue.

20           And so in that regard we escheated  
21 the funds that were then due to Delaware  
22 in exchange, or at their direction in lieu  
23 of an extension.

24           But money will continue to accrue.  
25 Essentially daily -- there are annual

1  
2 reporting deadlines, but the money will  
3 continue to accrue as this litigation goes  
4 on. And, again, we would be thrilled to  
5 place it somewhere where there's not going  
6 to be any dispute by any parties over who  
7 is entitled to these funds.

8 MoneyGram, at the point where the  
9 funds become escheatable to the State,  
10 MoneyGram understands that they do not  
11 have the right to hold the funds.

12 We are not trying to, we have never  
13 tried to, we continue not to try to.

14 So we are left in a situation which  
15 we have been left in now for several years  
16 where we are stuck between different  
17 States telling us what to do about the  
18 same pot of money.

19 Your Honor, please understand that  
20 part of the concern for MoneyGram is there  
21 are, in addition to reporting obligations,  
22 there are penalties and statutory  
23 interests.

24 And when I say interests, I don't  
25 mean 2 percent over liable. I mean

1  
2 statutory interests of 10, 12, 15 percent  
3 that could be assessed on the holder for  
4 reporting property late.

5 We don't want to be in a situation  
6 where we get, where MoneyGram gets  
7 hammered with those interests and  
8 penalties without the benefit of  
9 indemnification because the State doesn't  
10 like where we send the property.

11 So we would certainly be open,  
12 without having the need to be a party, to  
13 placing the funds wherever it was amenable  
14 to the Court.

15 MR. HAVERSTICK: Your Honor, that  
16 offer is laudable, but it's, according to  
17 Mr. Rato, the same offer that he made some  
18 time ago when Pennsylvania at least had an  
19 understanding that no more funds, pending  
20 the disposition of this lawsuit, be  
21 escheated anywhere. Now, we learn today  
22 that that's not actually what's happening.

23 So I believe I may be forgiven for  
24 suggesting that we should verify. And how  
25 do we verify? We keep MoneyGram in the

1  
2 case so that no one State in that period  
3 where we are doing the litigation, no one  
4 State can strong-arm MoneyGram into  
5 ostensibly setting aside the money, but  
6 maybe not all. Maybe some of it will go  
7 there.

8 Mr. Rato makes a great point about  
9 penalties, Your Honor. And it's another  
10 reason MoneyGram needs to be in this case.  
11 He's absolutely correct.

12 Many states, Delaware presumably, I  
13 know I speak for Pennsylvania when I say  
14 Pennsylvania does, indeed do have, penalty  
15 provisions for failing to remit money in a  
16 timely way.

17 If it is determined down the line  
18 that MoneyGram improperly somehow  
19 escheated the money to Delaware when it  
20 knew or should have known it was supposed  
21 to go to Pennsylvania, that may be a basis  
22 for which Pennsylvania can recover  
23 penalties as to MoneyGram. Certainly  
24 Delaware, I doubt, has agreed to indemnify  
25 MoneyGram for penalties and fees that are

1  
2 statutory. I don't know that. But maybe  
3 Mr. Rato can enlighten us.

4           However, if you determine that  
5 MoneyGram should all along have been  
6 remitting funds to Pennsylvania, including  
7 the back fee apparently, when not all that  
8 long ago -- then I can recover against  
9 MoneyGram only. I presumably cannot  
10 recover against Delaware. Finally, Your  
11 Honor --

12           JUDGE LEVAL: Isn't there a Supreme  
13 Court precedent to the fact that a holder  
14 should be held harmless when caught  
15 between the claims of the escheat claimed?

16           MR. ROSENTHAL: There are three,  
17 Your Honor. And the best way to hold  
18 MoneyGram harmless is to keep MoneyGram in  
19 the case so that you, when you decide  
20 where money should be going, can make  
21 certain that there is no inconsistent  
22 judgment as to MoneyGram's obligations,  
23 Delaware's, Pennsylvania's, or any of the  
24 Coalition States.

25           What we risk otherwise is potential

1  
2 serial litigation where you may decide  
3 something, but three years down the road  
4 if, for instance, there's litigation over  
5 penalties, there could be potential --

6 JUDGE LEVAL: I'm a little bit  
7 puzzled by MoneyGram's position. I don't  
8 purport to understand each party's point  
9 of view, but I could think of arguments  
10 why MoneyGram should want to be in this  
11 case so that the Supreme Court could  
12 ensure that it not be caught between the  
13 claims of different States, which might  
14 not be the case if Pennsylvania or any  
15 other case sued MoneyGram in its own  
16 courts saying, You owe us this amount of  
17 money plus these amount of interests plus  
18 these amount of penalties. And if you  
19 want to rely on Delaware to indemnify, be  
20 our guest, but just give us the money.

21 MR. HAVERSTICK: We agree, Your  
22 Honor. We agree with that proposition.

23 JUDGE LEVAL: Yes, you do, but what  
24 does MoneyGram think?

25 MR. RATO: We certainly understand

1  
2 that position, Your Honor. We don't think  
3 or at least we didn't think that that was  
4 necessary in light of the three Supreme  
5 Court cases that have all said very  
6 clearly that it's a violation of the  
7 holder's due process right to be held  
8 liable twice for the same property.

9 Pennsylvania's amended complaint --

10 THE COURT: How does that protect  
11 you if you are separated for a time and  
12 not paying anybody, but saying we will pay  
13 whoever we are told eventually to pay.  
14 And then whatever State is determined to  
15 be entitled to that payments says to us,  
16 Okay. Pay us. And what's more, you owe  
17 us this much interest and this much  
18 penalties.

19 You're not being held by two  
20 different States. You're just being held  
21 to one State with interest and penalties  
22 amounts because you didn't pay on time.

23 MR. RATO: Well, Your Honor, the  
24 interest and penalties only have arisen as  
25 the matter of not paying, again, on time.

1  
2 To the extent that property -- so we have  
3 the distinction that I made before between  
4 past due property and property that  
5 continues to become due.

6 Property that continues to become  
7 due honestly to the extent that the States  
8 demands the property, and we are left with  
9 no choice but to escheat it, it would be  
10 irresponsible for us to not escheat it,  
11 understanding that we certainly don't --

12 JUDGE LEVAL: Which states? You  
13 have two states. If you're looking at a  
14 State to demand the property, you've got  
15 at least two States saying that they want  
16 the property.

17 MR. RATO: Correct. But --

18 JUDGE LEVAL: So if you're not  
19 paying anybody, how does that protect you  
20 from -- if you're not paying anybody, how  
21 does that protect you from interests and  
22 penalties?

23 MR. RATO: That's correct, Your  
24 Honor. And that's why our practice has  
25 been to seek extensions and waivers of

1  
2 those interests and penalties from the  
3 States --

4 JUDGE LEVAL: But those have been  
5 denied.

6 MR. RATO: I'm sorry?

7 JUDGE LEVAL: But those have been  
8 denied.

9 MR. RATO: They were the last time  
10 around. I mean, they had been granted  
11 prior to that. But the main issue that we  
12 have with being a party, and again, the  
13 things that proposes to bring us in, is  
14 Pennsylvania's proposed third-party  
15 complaint against MoneyGram.

16 That proposed complaint in  
17 Paragraph 42 acknowledges that  
18 historically, MoneyGram sent to Delaware  
19 the sum of \$10.3 million, and I'm rounding  
20 up. In the three prayers for relief in  
21 Pennsylvania's amended complaint, in  
22 Counts A, B, and C, each one of them  
23 requests or suggests, seeks a declaration  
24 that MoneyGram is liable to Pennsylvania  
25 for the sum of \$10.3 million. In other

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words, the exact same money that Pennsylvania's complaint alleges has been turned over to MoneyGram.

To us, those counts in the complaint are absolutely foreclosed by Standard Oil versus New Jersey; Western Union versus Pennsylvania; and Texas versus New Jersey. Because they are expressly asking the Court for the declaration that we turn over property that has already been turned over to another State.

When MoneyGram has official checks that are outstanding and unpaid, they are held in an operating account. They are not commingling with MoneyGram's income. They are held waiting to be paid out. When those funds are escheated, they are taken out of that operating account, and they are turned over the State.

The \$10.3 million that got escheated to Delaware came out of those funds. The \$10.3 million that Pennsylvania seeks acknowledging and, in fact, alleging in their complaint, has already been turned

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2 over to Delaware can't come out of those  
3 operating funds. We're certainly not  
4 going to take funds from other official  
5 check payees to pay unclaimed funds to  
6 Pennsylvania. So where does it come from?

7 It comes from MoneyGram's operation.  
8 It comes from MoneyGram's business. It  
9 comes from MoneyGram's shareholders.  
10 That's when MoneyGram has a due process  
11 right to not pay the state property fund.

12 MR. HAVERSTICK: Your Honor, I will  
13 add and then sit down, unless you have any  
14 more questions for me.

15 We don't say MoneyGram has to pay  
16 twice. What we specifically say, and it's  
17 in our reply. We argue that because of  
18 the statutory scheme, Pennsylvania's and  
19 Delaware's, it may be that the only way  
20 that the Court can make Pennsylvania whole  
21 is to order Delaware to indemnify  
22 MoneyGram. And then MoneyGram turn around  
23 and mechanically send that money to  
24 Pennsylvania.

25 It's not a question. It's never

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2       been a question that MoneyGram would be  
3       responsible to pay \$20 million as opposed  
4       to \$10 million.

5               It's simply a function of how we  
6       think the statutory scheme may work. And  
7       the only way and best way to work all of  
8       these issues out is for MoneyGram to be  
9       heard to argue on its own behalf; to  
10      remind the Court and tell the Court when  
11      it thinks the Court's gone far enough or  
12      too far; to ask for the Court's assistance  
13      if MoneyGram is in a position where one  
14      State grants waivers and does not require  
15      remittance of another and requires  
16      remittance of escrow or escheatable funds,  
17      and another State is forcing MoneyGram to  
18      turn that money over, the best place  
19      MoneyGram could be is in this courtroom.  
20      Thank you, Your Honor.

21              MR. RATO: Your Honor, if I may  
22      respond. Well, it's really a comment.  
23      It's not an argument against Mr.  
24      Haverstick and what Mr. Haverstick just  
25      said.

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JUDGE LEVAL: Let me ask a question.

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If I deny Pennsylvania's motion to include

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MoneyGram in this case, is Pennsylvania

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then planning to sue MoneyGram in

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Pennsylvania courts with the ultimate

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result of that case to abide the Supreme

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Court's judgment in this case?

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MR. HAVERSTICK: We may have to

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mechanically. We don't know. There's a

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statutory scheme that Pennsylvania, under

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the Disposition Act, is required, we

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believe may be required to follow. Which

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means we can't collect from another

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Sovereign State. We can only collect from

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the holder. That's the language.

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JUDGE LEVAL: Contrary to your own

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law?

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MR. HAVERSTICK: But it makes sense

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in context of Delaware's indemnity.

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Because Delaware's Indemnity Law makes it

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plain that in a situation like that, where

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we have to go after a holder, Delaware

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turns around and it indemnifies the holder

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dollar for dollar for every amount of

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2 money that MoneyGram made wrongfully and  
3 escheated to Delaware. So in that context  
4 it made sense.

5 JUDGE LEVAL: You are contemplating  
6 that if the Supreme Court decides that  
7 payments were made by MoneyGram to  
8 Delaware which should have gone to  
9 Pennsylvania, you're contemplating that  
10 you might not be able to receive those  
11 from Delaware?

12 GLASSES: Delaware very well could  
13 take the position that under its statutory  
14 scheme and under Pennsylvania statutory  
15 scheme, Delaware can't make a direct  
16 payment to Pennsylvania to reimburse  
17 Pennsylvania for wrongfully escheated  
18 funds.

19 Delaware's indemnity statute does  
20 not speak to Delaware correcting an error  
21 made by MoneyGram and where it escheated  
22 money by Delaware directly paying the  
23 State to which the money should have gone  
24 in the first instance.

25 It only speaks to indemnify

1  
2 MoneyGram for any money MoneyGram  
3 wrongfully escheated to Delaware, and then  
4 turns around and has to escheat back to  
5 where it went in the first place.

6 I suppose the point I'm trying to  
7 make, Your Honor, is that we're in kind of  
8 virgin territory here. And we're not  
9 quite sure as an operational matter how  
10 this is going to work at the end, if  
11 Pennsylvania and the Coalition States  
12 prevail.

13 But since we can't say for sure that  
14 we're wrong that we have to collect from  
15 MoneyGram, who in turn collects from  
16 Delaware, then I think it's appropriate  
17 until we sort them out, to keep MoneyGram  
18 in the case so we don't have to think  
19 about; do we go into Pennsylvania State  
20 Court? Do we sue on Delaware?

21 JUDGE LEVAL: How long has MoneyGram  
22 been making payments to Delaware?

23 MR. RATO: Well, historically, Your  
24 Honor, MoneyGram has escheated unclaimed  
25 official checks to Delaware.

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JUDGE LEVAL: That goes back how far?

MR. RATO: It only goes back, I believe, to 1991. Prior to that time, MoneyGram's predecessor company, Travelers Express, was incorporated in Minnesota and escheated those funds to Minnesota.

JUDGE LEVAL: So the \$10 million this is all the money that you've paid, that you've escheated to Delaware since you became a Delaware corporation as opposed to a Minnesota corporation?

MR. RATO: No. The \$10.2 million was the amount that added some of the confusion -- to take a step back.

The thing that brought this entire case to fruition was an audit, and unclaimed property audit of MoneyGram was conducted by the several States in 2012, maybe 2011.

It was started by an outside auditing firm. That outside auditing firm came in, did a review of all of MoneyGram's official checks, did a review

1  
2 of all checks that were escheated. The  
3 \$10.2 million was the number of  
4 Pennsylvania purchased official checks  
5 that had been escheated to Delaware as of  
6 the conclusion of that audit. Which this  
7 predated this litigation probably by a  
8 year-and-a-half. So the amount would be  
9 higher at this point.

10 JUDGE LEVAL: Higher by virtue of --

11 MR. RATO: More time every year.

12 JUDGE LEVAL: It goes back to the  
13 beginning of the time that you were  
14 incorporated in Delaware?

15 MR. RATO: It actually goes back  
16 further than that. I don't know that the  
17 number that they pled, whether that was  
18 Pennsylvania purchased official checks  
19 that MoneyGram escheated to a State of  
20 incorporation, which was Delaware for most  
21 of the audit period, but Minnesota for  
22 three years of the audit period, or  
23 whether it was just Delaware. I don't  
24 know the answer to that question, but I  
25 could find out.

1  
2 I would simply also note, Your  
3 Honor, just to be candid about the  
4 scheduling, that if MoneyGram is brought  
5 in as a party, MoneyGram will, I think,  
6 necessarily, unless some kind of  
7 stipulation will be reached, need to bring  
8 its claim for indemnification from  
9 Delaware as well as its claim that no  
10 penalties and interest should be assessed  
11 by Pennsylvania as part of its defense.

12 JUDGE LEVAL: Another question. Are  
13 these official checks drawn on a bank?

14 MR. RATO: They are, Your Honor.  
15 They are -- well, MoneyGram is the -- a  
16 couple of different things. I'll take a  
17 step back.

18 MoneyGram sells various different  
19 items. It does sell a product that  
20 MoneyGram refers to as a retail money  
21 order that gets escheated to the State of  
22 purchase.

23 That's completely -- my  
24 understanding of it is that is completely  
25 separate from any amount claimed by

1  
2 anybody in this lawsuit.

3           Then we have the official check  
4 problem. There's more than one variety of  
5 MoneyGram official checks. As Your Honor  
6 pointed out, it is not a name. It is the  
7 name MoneyGram calls it. It is not a  
8 specific UCC instrument.

9           There are more than one types of  
10 official check. However, there are, I  
11 would say, only a few types of official  
12 checks. There are primarily two.

13           One that is referred to as an  
14 official check, teller's check. One that  
15 is referred to as an official check,  
16 agented item.

17           JUDGE LEVAL: What was the second  
18 one?

19           MR. RATO: An agent item. Generally  
20 the distinction between the two is whether  
21 or not the signature on the check is  
22 MoneyGram as issuer, as it is with a  
23 teller check, or by the financial  
24 institution as agent for MoneyGram on the  
25 agented item.

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I don't know that those distinctions make any difference to any State's claim here. But just to sort of note, you know, what the reality is between the position that it's one thing or it's all these things, it's really very few things that are largely the same.

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JUDGE LEVAL: Is it that one category of them, the instrument is signed by --

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MR. RATO: It's listed as being issued by MoneyGram.

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JUDGE LEVAL: Issued by MoneyGram.

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MR. RATO: And then the other is issued by whatever the financial institution seller is as agent for MoneyGram.

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JUDGE LEVAL: So I suppose it follows that the ones that are signed, what are called teller checks, that are signed by an officer of MoneyGram were previously prepared and fixed denominations?

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MR. RATO: It's not fixed

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2 denominations. I believe they're,  
3 previously MoneyGram was given  
4 authorization for the execution of those  
5 items. The checks are drawn on a  
6 MoneyGram-owned bank account. It is not a  
7 MoneyGram -- Moneygram is not a financial  
8 institution.

9 Well, depending on what the State's  
10 definition of what a financial institution  
11 is. MoneyGram is not a bank. MoneyGram  
12 is not a State, Your Honor.

13 JUDGE LEVAL: But they are drawn on  
14 an account in a bank?

15 MR. RATO: In a bank, yes. So  
16 MoneyGram may have a bank account at  
17 R-A-K-F Bank in Oklahoma City. And that  
18 bank account is used for the clearance of  
19 official checks. So the financial  
20 institution seller, you go into a bank.  
21 You say, I would like -- you may say to  
22 the teller, I would like a teller's check  
23 because you're going to put a down payment  
24 on a house. And so you get a check from  
25 the bank for \$50,000.

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2           That bank, that check may very well  
3 be a MoneyGram official check. That check  
4 is drawn on a MoneyGram-owned bank  
5 account. The check is not necessarily,  
6 unless it -- it could be, but it's not  
7 necessarily drawn on a bank account at the  
8 financial institution where you purchased  
9 it. It's possible, but that's not the --  
10 they usually come from one of a few bank  
11 accounts.

12           And the items are generally in a  
13 higher dollar amount than a retail money  
14 order, which has a limited denomination  
15 that it can be.

16           JUDGE LEVAL: So the money orders,  
17 are they drawn on an account at a bank?

18           MR. RATO: I believe they are, Your  
19 Honor. I could check that. I don't know  
20 off the top of my head, but, yes. I  
21 believe they are.

22           They would have to be drawn on  
23 the -- for clearance purposes they would  
24 need to be cleared somewhere. And I believe  
25 they are still drawn on a bank.

1

2           The distinction with money orders,  
3           and when I say "distinction," again, I'm  
4           not trying to take a position on what any  
5           of the States want to characterize the  
6           items are. I'm simply noting that  
7           MoneyGram has a product that MoneyGram  
8           calls a MoneyGram. Whether that means it  
9           is for everybody's purposes here, I don't  
10          know. But they have an item that is  
11          called a money order that is traditionally  
12          sold at supermarkets and convenience  
13          stores and things like that, that is  
14          generally sold in smaller dollar amounts;  
15          a thousand dollars or less, I believe.

16                 And those look much more like what  
17          one would normally think of when one  
18          thought of a money order.

19                 JUDGE LEVAL: So the question for  
20          Pennsylvania is; If these are checks drawn  
21          on a bank, why aren't they third-party  
22          bank checks?

23                 MR. HAVERSTICK: That's not what we  
24          believe the definition of a third-party  
25          bank check is, Your Honor.

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By that, again, understanding what MoneyGram just said, then MoneyGram is a third-party bank check.

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The money has to be somewhere. I mean, the way the money is warehoused by MoneyGram, which is not the bank, is identical presumably for a money order and an official check.

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So I think the nomenclature being used, and the fact that the money is warehoused to the bank is required because MoneyGram itself is not a bank. It has to park its money somewhere so they can pay out. By that's different than a third-party bank check, because it operates in our view, and it's the case in chief, differently than the money order, and differently than an official check, which are demanding instruments in a way that we believe the third-party bank check is not.

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MR. DISHER: And, Your Honor, if I may add to that briefly, because that really goes to the heart of the case. We

1  
2 think after the appropriate limited  
3 discovery on MoneyGram, we will be able to  
4 show that there is very little practical  
5 difference between what is a money order  
6 and what is an official check.

7 Labels aside and as a practical  
8 matter, they have a very similar effect.  
9 And money orders are obviously within the  
10 terms of the Statutes.

11 And, again, this is getting to the  
12 heart of the case, which, of course, will  
13 brief out in full. But when it all boils  
14 down, and the labels are all taken apart,  
15 we will show that what MoneyGram labels  
16 official check is effectively either a  
17 money order or a simpler instrument. And  
18 so that's the answer to your question of  
19 why is it not a third-party bank check.  
20 But, again, we will brief in full at the  
21 appropriate time.

22 MS. MOSELEY: Your Honor, we are  
23 going to have to object to the definition  
24 of the third-party bank check that  
25 Pennsylvania sets forth in a 24-page

1  
2 branch memorandum. We haven't been able  
3 to fully digest it yet.

4 MR. HAVERSTICK: I bet you, Your  
5 Honor, this is the first time you've ever  
6 been in an oral argument where people  
7 objected so often. I didn't think we were  
8 trying the case yet. I mean, we can.

9 JUDGE LEVAL: Let's take a  
10 fifteen-minute recess.

11 (Whereupon, a brief recess was  
12 held.)

13 JUDGE LEVAL: All right. I will  
14 take those issues under advisement. And  
15 so the only items remaining on the agenda  
16 is the case management plan and time for  
17 submission of proposals; timing issues and  
18 the other issues.

19 Now, I suppose you will tell me that  
20 some of those can't be answered without  
21 knowing what my ruling will be as to these  
22 motions. But does anybody have anything  
23 to say on those timing submission and  
24 proposals?

25 MR. DISHER: Your Honor, Todd Disher

1  
2 for Texas. I think you're exactly right.  
3 It will depend on your rulings on the  
4 other issues.

5 One of the things I'll say on the  
6 case management claims in terms of  
7 scheduling is obviously what we learned  
8 today, that money is going from MoneyGram  
9 to Delaware. That was not our  
10 understanding.

11 And so just as the Defendant States  
12 are concerned, we're going to have to look  
13 at that issue and see if we can take any  
14 type of immediate action now knowing what  
15 we know now. So that may be an issue that  
16 comes up.

17 MR. RATO: Your Honor, if I may. We  
18 are willing to drop our opposition to the  
19 motion to be added as a party.

20 JUDGE LEVAL: Drop your opposition  
21 to what?

22 MR. RATO: To be added as a party.  
23 So that at least we can have us all here.  
24 If we're ordered to implead, we're happy  
25 to implead with the understanding, and as

1  
2 I understand it, that's it's documented we  
3 do not intend to take any position as to  
4 which State is correct.

5 We don't intend to make a decision  
6 on what State has entitlement, but we do  
7 want to make sure that we are protected to  
8 the fullest extent possible from any  
9 liability or for escheating funds from one  
10 place to someplace else.

11 JUDGE LEVAL: I was about to rule in  
12 your favor. I take it you still want to  
13 drop your opposition?

14 MR. RATO: I do, Your Honor. You  
15 all heard that.

16 JUDGE LEVAL: All right. So  
17 anything further to be said on the case  
18 management plan?

19 MR. ROSENTHAL: State of Delaware.  
20 I don't disagree with my colleague. Maybe  
21 what we could propose is that once Your  
22 Honor has issued a ruling that we produce  
23 the plan within 30 days, some specified  
24 period of time, and we would then proceed  
25 accordingly:

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JUDGE LEVAL: All right. Anyone has anything to add, any other issues that anyone would like to discuss?

(No verbal response.)

JUDGE LEVAL: Then we will adjourn. And have you had a chance in the recess to discuss the issue I raised near the beginning about having somebody representing all of the opposing States, the other States at law?

MR. VOSS: We have not. At least, Pennsylvania has not had an opportunity to do with the Coalition States yet, but we will do so.

MR. DISHER: We have in our Coalition, separate and apart from Pennsylvania and Wisconsin, we have 27 States. So we need to talk to them about that issue.

JUDGE LEVAL: Yes, of course.

MR. HAVERSTICK: Your Honor, and I will add that it's very easy for Pennsylvania to appear live. In the event if we do, it would be some smaller subset

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of the States to speak on behalf of.

JUDGE LEVAL: Okay.

MR. RATO: Your Honor if we could have 21 days to file an answer? We have not answered.

JUDGE LEVAL: Right. So, yes. 21 days to file an answer. Thank you.

Wait now. Just a second. I have some other concerns about the issue of MoneyGram being added for all purposes to this case; which are that it puts the Supreme Court in a position of needing to decide, it puts the ultimate decider, and I don't know whether in this case that's me or the Supreme Court, but I think it's probably the Supreme Court, of needing to decide various issues of State Law; Pennsylvania Law and Delaware Law.

Not for purposes of deciding the issue, not for purposes of deciding the matter that's properly before the Supreme Court, which is to say who is entitled to escheat these unclaimed MoneyGram instruments. But for deciding the issues

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2 of MoneyGram's liability, and I'm not  
3 altogether sure that it's appropriate for  
4 MoneyGram to be added, for all purposes,  
5 as a party to the case.

6 For that reason I'm inclined to  
7 think that I'm not sure that it's  
8 appropriate to add MoneyGram. This is the  
9 first time I have had a case within the  
10 original jurisdiction of the Supreme  
11 Court. I understand Pennsylvania's  
12 concerns about being sure that it gets  
13 complete recovery.

14 Nonetheless, I'm not altogether  
15 certain that that justifies your petition  
16 to implead MoneyGram.

17 MR. HAVERSTICK: Well, Your Honor,  
18 if I may --

19 JUDGE LEVAL: There are other  
20 methods of giving you protection, at least  
21 a degree of protection such as requiring  
22 MoneyGram to put money into escrow. And I  
23 just perhaps need to think more about it,  
24 and I'm taken by surprise by MoneyGram's  
25 change of position.

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Part of my reason for having been inclined to rule in its favor was that its precedence in the case brings into the case a bunch of issues that are just not issues that are in the Supreme Court's purview and not issues that the Supreme has reason to be concerned about.

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MR. HAVERSTICK: With respect, Your Honor, the Supreme Court has long recognized that in escheat cases, the interest of parties outside of the States are properly heard and can be heard within the same jurisdiction.

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JUDGE LEVAL: Can be --

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MR. HAVERSTICK: And indeed may be if that individual, a non-State individual party is going to be subjected to potential conflicting obligations as a result the Supreme Court's opinions.

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So to the extent that the Court's concern is resolving issues of State Law with respect to either Delaware's indemnity of MoneyGram or perhaps Pennsylvania State's requirement to

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2 recover from MoneyGram first and then be  
3 indemnified, I would posit consistent with  
4 Delaware's due process rights to not pay  
5 twice that issue, that those coagulation  
6 issues regarding how payment functions in  
7 the real world so that the winning States  
8 have a right to recover actual money and  
9 theoretic money and have to litigate all  
10 over the place.

11 The only way to protect Delaware's  
12 due process rights is for Delaware to be  
13 included in this action on its issues.

14 MS. MOSELEY: MoneyGram.

15 MR. HAVERSTICK: MoneyGram. I beg  
16 your pardon.

17 Now, if the Court's concern is the  
18 money veering off and the correlating  
19 issues about penalties and fines and  
20 things like that, I hadn't thought of that  
21 until now. Frankly, we were presented  
22 with the facts or circumstance today that  
23 made me think a little more about that.

24 That may be something that we can  
25 cleave off. I don't purport to say that

1  
2 we must litigate all of the issues  
3 Pennsylvania might have with respect to  
4 MoneyGram in this forum. But I think the  
5 one we have to, to make sure everybody's  
6 rights are protected, Delaware's,  
7 Pennsylvania's, the Coalition States, and  
8 perhaps most of all MoneyGram's, is at the  
9 end of this when you work out the very now  
10 limited factual issues in front of you,  
11 who is owed what? And who is paying who?  
12 All the potential payors, at least for now  
13 have to be inside this jurisdiction.

14 MR. ROSENTHAL: Your Honor, let me  
15 underscore what I said earlier, because I  
16 don't think it's been properly heard by  
17 Pennsylvania, because it brings up  
18 indemnity.

19 The State of Pennsylvania, I'm  
20 informed by the Attorney General that we  
21 have a history of paying over to other  
22 States claims that, unclaimed property  
23 that has been wrongfully paid to Delaware  
24 and should be paid to some other State.

25 We obviously have a disagreement

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here. But no one ever contends, and we certainly are not in front of Your Honor or in front of the US Supreme Court are going to contend that if the Supreme Court holds that we owe money, that the money that went to us should go to someplace else, that we are not going to honor that.

9

We have a history of honoring other requests without a judgment. We certainly will honor it when the Supreme Court makes a judgment in this respect. So I'm not sure -- I have great doubts that Your Honor or the Supreme Court is going to rule on issues on Delaware Law, on indemnities, and Pennsylvania's duties and how they go about getting unclaimed property. But at least the reason we came here was to get a disposition by the Court of the ultimate rights here.

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And we have no position about whether MoneyGram should be in, but if the only reason they're in is because of some doubt here that we will honor a decree, that should not be a reason to do it.

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MR. DISHER: And Your Honor, on behalf of the 27 States and Wisconsin, we are currently talking with MoneyGram about ways to ensure that they abide by the judgment, are bound by the judgment. And perhaps some type of stipulation.

So I just want to be clear that that's kind of the purpose that we're taking. And we're currently discussing with MoneyGram exactly how to accomplish that.

MR. HAVERSTICK: And Pennsylvania's concern, of course, as I articulated, is that may not be under our law, sufficient protection. It may or may not be. That's ultimately for you to decide.

Again, if I'm hearing Delaware correctly, Your Honor, and the Court can fashion an appropriate order, or perhaps we can fashion an appropriate stipulation about Delaware's obligation to satisfy a judgment to all of the States who may recover immediately and without recourse to MoneyGram or anywhere else that they

1  
2 agree. That if it's determined that the  
3 money was wrongfully escheated to  
4 Delaware, Delaware will turn around and  
5 write checks to all of the effective  
6 States, then we may be on to something.

7 I still have serious concerns about  
8 MoneyGram escheating money that's  
9 presently under dispute to Delaware in  
10 derogation of demands made on it by all  
11 the other States. I think we need to do  
12 something about that, regardless of  
13 MoneyGram's party to that. But perhaps  
14 that's something that you can work out in  
15 the stipulation.

16 MR. ROSENTHAL: Your Honor there's  
17 not going to be a stipulation. We have  
18 represented to you, and we represent to  
19 the Court that we will honor a decree  
20 entered in this case. We are not going to  
21 be entering into agreements on merits  
22 issues before this case is resolved. And  
23 we don't believe there is any need to do  
24 so.

25 JUDGE LEVAL: So what is Delaware's

1  
2 position? I take it that Delaware's  
3 position, as you stated, and what you  
4 stated was if the judgment of the Supreme  
5 Court tells us we owe money to other  
6 States, we will pay?

7 MR. ROSENTHAL: Absolutely, Your  
8 Honor.

9 JUDGE LEVAL: I take it that that is  
10 true, that that would apply as well to an  
11 aspect of that judgment, the Supreme Court  
12 judgment, including an interest factor,  
13 and you would honor that as well.

14 MR. ROSENTHAL: Yes. Although we  
15 don't necessarily agree there would be an  
16 interest factor involved here.

17 I mean -- but the bottom line is  
18 whatever the Supreme Court ultimately  
19 rules after it hears the merits, the  
20 States of Delaware as we believe --

21 JUDGE LEVAL: Well, why would there  
22 not be an interest factor, if not for the  
23 simple fact that for X years, Delaware has  
24 held money that should have gone to  
25 another State?

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Why would there not be? And I don't mean by that, interest pursuant to Pennsylvania's statute. I mean, interest pursuant to a Supreme Court's judgment that this is an appropriate interest payment for one who has held another party's money for X period of time?

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MR. ROSENTHAL: Your Honor, to be very frank with you, I have not thought about interest at all. I'm not aware of whether the Supreme Court in the past has attached interest. My vague understanding is that there hasn't been interest factors involved.

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I don't know what the law would be. I'm not -- Delaware is taking a position on that issue, but I did not want to be understood as agreeing --

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JUDGE LEVAL: But you're not saying, are you, that if the Supreme Court says, You owe interest, you are going to refuse to pay it?

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MR. ROSENTHAL: No. Of course not, Your Honor. My point is whatever the

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2 Supreme Court orders as a result of the  
3 disposition of this case -- and I assume  
4 you will ask the same question of the  
5 other side as well -- that if a resolution  
6 indicates to the contrary that maybe some  
7 money is owed to us. That the bottom line  
8 is that every State will honor the  
9 Supreme's Court's decrees as we always  
10 have.

11 JUDGE LEVAL: I would have thought  
12 that that is an unnecessary thing to say  
13 that all States will abide by the judgment  
14 that the Supreme Court makes. Which  
15 doesn't mean that the States cannot argue  
16 to this Special Master or to the Supreme  
17 Court that certain aspects of the judgment  
18 are inappropriate and shouldn't be  
19 entered.

20 MR. HAVERSTICK: Your Honor, I  
21 appreciate the words of Counsel. And I  
22 certainly --

23 JUDGE LEVAL: It does seem -- and I  
24 will add one more thing. It does seem to  
25 me that a party in a position of

1  
2 MoneyGram, that with respect to funds that  
3 you have previously paid to State A, which  
4 are subsequently determined by the Supreme  
5 Court to have been payable instead to  
6 State B, that MoneyGram owes State B  
7 interest, much less penalties on those  
8 funds for the period in which they were  
9 not in MoneyGram's hands, but in the hands  
10 of State A.

11 That would seem to be subjecting  
12 MoneyGram to a form of double liability,  
13 because it wouldn't have been liable for  
14 interest if it had made the payment to the  
15 State B instead of State A. And it didn't  
16 have the use of the money during the  
17 period in which it went to the wrong  
18 State.

19 MR. HAVERSTICK: But it did have the  
20 choice as to which Sovereignty from which  
21 to escheat funds. And if it turns out  
22 that MoneyGram made the wrong choice,  
23 there may be consequences to MoneyGram  
24 under all --

25 JUDGE LEVAL: Just a question about

1  
2 that. Did I understand you correctly that  
3 as to payments made by MoneyGram to  
4 Delaware after, after Pennsylvania and  
5 perhaps some other states as well  
6 expressed to MoneyGram you should be  
7 paying us and not Delaware, that MoneyGram  
8 received a contractual commitment from  
9 Delaware to indemnify you for -- is that  
10 correct?

11 MR. RATO: That is correct, Your  
12 Honor.

13 JUDGE LEVAL: So you're saying that  
14 with respect to such funds, Delaware has  
15 guaranteed contractually that whatever you  
16 pay to Pennsylvania will be reimbursed?

17 MR. RATO: That's the understanding.

18 MR. HAVERSTICK: Your Honor, I want  
19 to with certainty understand, and I  
20 appreciate Counsel's words, as I said.

21 But I am leery of reluctance by  
22 Counsel to enter into a stipulation  
23 agreeing to terms of payment to the  
24 affected States should Delaware lose and  
25 the other States prevail.

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2 JUDGE LEVAL: Say that again. I'm  
3 sorry.

4 MR. HAVERSTICK: Here's my concern,  
5 You Honor. I will be quite blunt about  
6 it. I think I was before, and frankly the  
7 purpose, one of the purposes we've brought  
8 MoneyGram in the case, and I'm not saying  
9 it's exacerbated now that we found out  
10 that contrary to our collective  
11 understanding that MoneyGram would not be  
12 remitting monies to Delaware. Delaware  
13 would be strong-arming MoneyGram to do so,  
14 and money continues to flow to Delaware  
15 that is the subject of this dispute.

16 So I think I can be forgiven for  
17 being a little bit suspicious of our  
18 friends in Delaware that they will honor  
19 their obligations in a manner that is  
20 consistent with -- if the Court decides.

21 JUDGE LEVAL: Do you think that  
22 Delaware is just not going to honor a  
23 judgment of the Supreme Court?

24 MR. HAVERSTICK: I want to guard  
25 against it, and get appropriate

1  
2       protections. And that's the reason why I  
3       want MoneyGram in the case.

4               After litigating for several years,  
5       I do not want to find Pennsylvania in a  
6       position or indeed any of our Coalition  
7       States in a position where Delaware  
8       agrees, yes. We will honor a judgment in  
9       the Supreme Court. We will not hang  
10      MoneyGram, and MoneyGram is not a party so  
11      you will have to chase MoneyGram to get  
12      your money, or something like that, that  
13      none of us in this room have thought yet.  
14      Because we haven't gotten that far down  
15      the road.

16             If we get to a point in time where  
17      mutually, and I think that includes the  
18      Court, we understand precisely how the  
19      obligations as between the States will  
20      work in a very practical way, not in a  
21      femoral or in an academic way, but in a  
22      very unique way, because we are talking  
23      about taxpayer money. We are talking  
24      about tax payer funds. Ultimately, the  
25      end result is it's taxpayers' funds. And

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taxpayers are funding this litigation.

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It's important to the treasurer of

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Pennsylvania to understand, not only what

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his rights are and his obligations are,

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it's important for him to execute his

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duties faithfully by understanding if he

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is right in his articulation of his right

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to receive that money, that Pennsylvania

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promptly will recover the money they are

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He does not want to litigate for

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years and years and years to chase a paper

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judgment. If we can mutually come to an

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understanding about, and, as I said, in a

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meaningful, operational real world way,

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just as we would if we were trying the

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case in front of a jury, understand how

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the money flow would work.

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I can be comfortable with it. I can

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be comfortable with representations from

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counsel. But I don't have that yet, Your

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Honor.

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And in fairness to all of us in the

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room, including counseling, I don't know

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if we've all thought through how it might work.

And that's the reason we wanted MoneyGram in the case; not to belittle MoneyGram, not to bully MoneyGram, and certainly not to make the case more complicated. To the contrary.

So we know that at the end of it we can be comfortable that whatever judgment you reach and the Supreme Court reaches will be able to be effectively and meaningfully enforced without years of more costly taxing payer litigation.

JUDGE LEVAL: I meant to ask this earlier; does any of you know whether under the practices of the Supreme Court with respect to original jurisdiction and litigation, does the possibility exist if we reach the point where I would render a proposed declaratory judgment on a summary judgment basis, where I would say that either Delaware or other States are the ones entitled to receive the escheat with respect to these so-called official checks

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2 of MoneyGram, is there a procedure whereby  
3 that judgment, that proposed judgment can  
4 be submitted as a partial summary judgment  
5 for review by the Supreme Court in the  
6 manner in which in a case in ordinary  
7 Court jurisdiction there might be an  
8 interlocutory or partially interlocutory  
9 appeal in the judgment of the District  
10 Court on the merits before reaching the  
11 particulars of liability?

12 MR. ROSENTHAL: Your Honor, I don't  
13 have a precise answer. But my past  
14 reading of past cases, and I was actually  
15 involved in one many years ago, one  
16 multi-state case, is that generally  
17 speaking, the Court wants final ruling on  
18 the whole case. Whether if you decided  
19 that you thought it was in the best  
20 interest to render a decision on the  
21 liability, and then have the parties take  
22 exceptions to that. And then deal with  
23 them separately.

24 I'm not sure you are prohibited from  
25 doing that. The order you received said

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2 issue orders as you see fit. Reports as  
3 you see fit.

4 But it may be worthwhile the parties  
5 looking at past precedence to see whether  
6 what you are suggesting has occurred in  
7 the past and what the Supreme Court has  
8 said about it.

9 MR. DISHER: Your Honor, I don't  
10 have a definitive answer for you, but I  
11 would direct the Court to FRCP 54 B  
12 regarding judgments on a part of the case  
13 as well as Supreme Court Rule 17.2, which  
14 essentially directs that an original  
15 action FRCP is followed.

16 So I don't have any case law support  
17 for that right now, but under the Supreme  
18 Court rule in conjunction with FRCP, it  
19 seems like that is a possibility that  
20 could happen.

21 JUDGE LEVAL: Well, 54B is the  
22 vehicle for appeal from a partial  
23 judgment.

24 MR. DISHER: Sure.

25 JUDGE LEVAL: And what does the

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Supreme Court Rule, 17.2?

MR. DISHER: 17.2. Essentially just saying that FRCP applies to an original action.

MR. ROSENTHAL: Generally speaking.

MR. DISHER: Yes.

MR. ROSENTHAL: The precise question you answered, I think, would benefit from a little research from the parties.

JUDGE LEVAL: Yes, yes, yes. I wondered if anybody had any experience with that or knowledge at the present. All right.

So perhaps you should discuss further amongst yourselves and MoneyGram whether some kind of arrangement can be made that would adequately protect States in the Defendant category, Defendant counterclaim category without making MoneyGram a party to the case at least at this time. And let me know about that within a week. All right. Thank you.

MR. HAVERSTICK: We will take a copy of the transcript.

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MR. DISHER: We will take a copy of  
the transcript.

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(Whereupon, the conference was  
concluded at 4:41 p.m.)

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C E R T I F I C A T E

I, Susan Petty, a reporter and Notary  
Public within and for the State of  
New York, do hereby certify:

That the witness(es) whose testimony is  
hereinbefore set forth was duly sworn by me,  
and the foregoing transcript is a true record  
of the testimony given by such witness(es).

I further certify that I am not related  
to any of the parties to this action by blood  
or marriage, and that I am in no way interested  
in the outcome of this matter.

---

Susan Petty

<b>A</b>				
<b>\$10</b> 14:15 51:20 107:25,25 129:4 133:9	<b>acknowledge</b> 105:5	<b>adds</b> 9:14	<b>agreement</b> 10:4 25:2 77:13 82:12 118:14	<b>analysis</b> 19:3
<b>\$10.2</b> 133:14 134:3	<b>acknowledged</b> 45:10	<b>adequate</b> 98:4	<b>agreements</b> 154:21	<b>analyzed</b> 41:14
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